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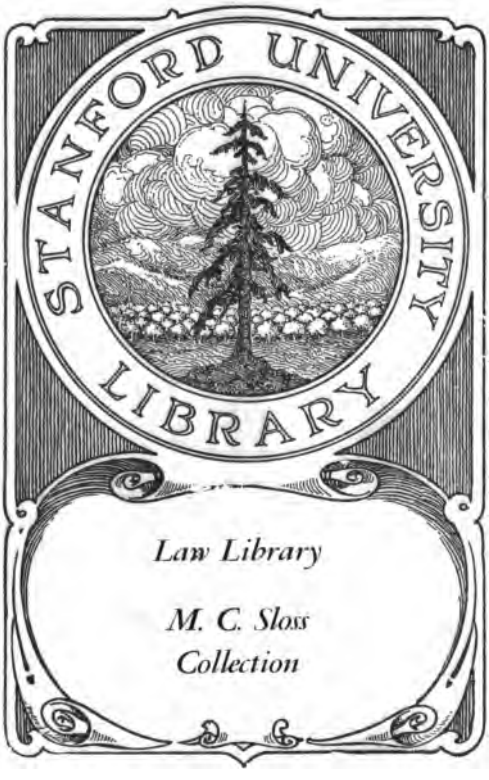
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THE SOUTH AUSTRALIAN

LAW REPORTS

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF SOUTH AUSTRALIA

IN THE YEAR

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THE HON. SAMUEL JAMES WAY, CHIEF JUSTICE.

THE HON. JAMES PENN BOUCAUT, SECOND JUDGE.

THE HON. WILLIAM HENRY BUNDEY, THIRD JUDGE.

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Only 351 shares were applied for by the public, when W. (the vendor to the proposed company) put in an application in the name of H. for the remaining 141 shares, but paid no cash in connection with the application.

On the winding up of the company there was a surplus, and A. (a contributory) took out a summons calling upon H. to show cause why he should not be removed from the register on the ground that the application in the name of H. by W. for 141 shares was a fraud, and that the company never was properly constituted.

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DEBATES, HANSARD REPORTS OF PARLIAMENTARY. See Libel.

DEBT. See Insolvency. 6.

——— ACTION FOR. See Married Women's Property Act 1883-4.

——— AND INTEREST, MORTGAGE. See Insolvency. 1.

DEBTOR, MEETING OF CREDITORS PRIOR TO PETITION BY. See Insolvency. 2.

DECISION OF COURT BELOW, SPECIAL CASE UNDER CLAUSE 37 STATED BEFORE. See Insolvency. 4.

DECLARATION AGAINST INTEREST. See Libel.

DEED OF ASSIGNMENT. See Insolvency. 4.

DELIVERY. See Charter Party.

DEMAND PROVABLE UNDER INSOLVENCY. See Insolvency. 6.

DEMURRER. See Libel.

DEPOSIT RECEIPT AND VOUCHER. See Stamp Act 1886.

DISCRETION OF COMMISSIONER. See Insolvency. 3.

DISTRICT COUNCILS ACT 1887—*Rate—Assessment—Appeal to Local Court—Special case—Jurisdiction of Supreme Court.* The Supreme Court has no jurisdiction to entertain a special case stated by a Local Court in respect of an appeal against an assessment of rates under The District Councils Act 1887. *The District Council of Penola* v. *Hoggarth* 65

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DIVISIBILITY OF CONTRACT. See Specific Performance.

ENDOWMENT POLICY. See Life Assurance Acts. 1.

ENGLISH COMPANY. See Company. 4.

EQUITABLE MORTGAGE OF POLICY OF ASSURANCE. See Life Assurance Acts. 2.

EQUITY ACTION. See Injunction. 1.

ESTATE, SEPARATE. See Married Woman's Property Act 1883-4.

EVIDENCE. See Real Property Acts.

———— ACT 1852. See Real Property Acts.

EXCHANGE, RULES OF. See Injunction. 2.

———— STOCK. See Injunction. 2.

FREIGHT. See Charter Party.

GAZETTE, GOVERNMENT, NOTICES IN. See Libel.

GOLD MINING ACT 1885, SECS. 5 AND 7 — *Mandamus to Warden — Miner's right — Mining license — Power of warden.* Her Majesty through Her wardens of goldfields has absolute discretion as to the issue of miners' rights or licenses under The Gold Mining Act 1885. *Regina (on the application of Joachim Matthias Wendt)* v. *Gee* 164

GOVERNMENT GAZETTE, NOTICES IN. See Libel.

HANSARD REPORTS OF PARLIAMENTARY DEBATES. See Libel.

HAWKER'S LICENSE. See Licensed Hawkers Act 1863.

IMPRISONMENT. See Insolvency. 6.

INDECENT LANGUAGE. See Police Act 1869-70.

INJUNCTION. 1. *Damages—Racing club—Membership—Possession of property by club—Malpractice—Suspension—Notice to accused member—Submission by accused member or other person to arbitration—Rules of club—Equity action—Nonsuit—Appearance by party as suitor and counsel.* F. was a member of the S.A. Tattersall's Club, of the committee of which the defendants were members. F. had a dispute with C. another member, concerning a bet, which dispute was referred by F. and C. to the arbitration of the committee of the S.A. Tattersall's Club, C. having intimated to F. that F. had better not go before Tattersall's as he C. would expose F. were F. to do so.

No other question but that concerning the bet was referred to arbitration, but C. made a charge of malpractice against F., upon which the committee adjudicated notwithstanding that F. refused to go into the charge, and called no evidence concerning it.

Upon the consideration of the matters in dispute between F. and C. and after hearing the evidence of both parties and other witnesses the members of the committee present found upon certain facts which such members held were admitted or proved that F. was guilty of malpractice, and after referring the matter to a fuller committee, the committee suspended F. and caused the following notice to be posted in the clubroom:—

"List of defaulters by S. A. Tattersall's:

"For malpractice—Seth Ferry, February 12, 1889."

On the trial of this action P. F. B. one of the defendants, appeared as one of the counsel for himself and the other defendants.

In the course of the proceedings an application was made for a nonsuit,

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It was submitted for the defendant that as the club had not and was not alleged or proved to have any property the defendants must have judgment, and it was also contended that the plaintiff had sufficient notice of the enquiry as to malpractice, and was otherwise bound by the rules which he had signed.

Held, that no person can take the position of suitor and counsel.

That (in this case) the absence of any allegation or proof of the possession of property was not an answer to the action.

That F. had not due notice of a charge of malpractice, nor did he submit to the arbitration of the committee of S. A. Tattersall's Club, and that submission of members and non-members to such arbitration is required by the rules of the S. A. Tattersall's Club in order to give the committee jurisdiction.

That F. was entitled to the injunction and judgment as claimed, with £250 damages.

Ferry v. *Bonnin and Others* 66

INJUNCTION. 2. *Interim order—Stock Exchange—Rights and privileges of member—Notice of charges to accused member—Rules of Exchange.* R. being a member of the Stock Exchange of Adelaide Incorporated, sent out a business circular to which the Exchange objected.

R. refused to unconditionally withdraw the circular.

At a meeting of the members of the Exchange, Rule 13 of the Exchange, which required notice to be given to an accused member of the holding of a special meeting to hear charges against him was by virtue of Rule 61 suspended, and R. was thereupon suspended from his rights and privileges as a member of the Exchange.

No charges were preferred against R., nor was any notice given him in accordance with Rule 13 of the Exchange.

Rule 47 of the Exchange provided that no member should be suspended unless three-fourths of the members should agree to such suspension. This rule was not complied with.

Held, that the suspension of R. was illegal, and an injunction until the hearing of this action granted.

Roach v. *The Stock Exchange of Adelaide Incorporated* 115

INSOLVENCY. 1. *The Insolvent Act* 1860—*Sec.* 131 *and Division VI—Mortgage debt and interest—Repurchase by assignor from trustee of mortgaged property after execution by assignor of statutory deed of assignment—Liability of assignor-purchaser to mortgagees.* F. being the unregistered proprietor of a certain freehold under the Real Property Act of 1861, executed a statutory deed of assignment under division VI. of The Insolvent Act 1860, to which deed the mortgagees of the freehold assented in writing.

F. subsequently bought back the freehold from the trustees of his assigned estate and in consideration of the production of the title to enable him to become registered proprietor, F. entered into an agreement in writing with the mortgagees that he would pay the principal and interest under the mortgage, and subsequently in consideration of an extension of time for payment of the principal F. entered into an agreement in writing with the mortgagees to pay the principal with interest at a reduced rate.

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An action was brought by the mortgagees against F. to recover interest under the mortgage.

Held, that F. was liable notwithstanding sec. 131 of The Insolvent Act 1860.

Mortgage Company of South Australia Limited v. *Foster* 135

INSOLVENCY. 2. *The Insolvent Act* 1886, *sec.* 85—*Meeting of creditors prior to petition by debtor—Adjudication—Meaning of word "convene."* An insolvent debtor cannot be adjudicated on his own petition before the time appointed for the holding of the meeting of creditors required by sec. 85 of "The Insolvent Act 1886."

The word "convene," as used in section 85 of "The Insolvent Act 1886," means there "bring together," not merely "call together."

In re Rudolf Fischer 1

——— 3. *The Insolvent Act* 1886—*Costs—Appeal by insolvent—Security for costs—Protection—Discretion of Commissioner.* On an appeal, interlocutory or final, by an imprisoned insolvent to the Supreme Court that Court may order the appellant to find security for costs.

If no sufficient reasons (instances of which are given in the judgment of Way, C.J., *infra*) be shown to the contrary it is the duty of the Court of Insolvency to grant protection to an imprisoned insolvent on proper security being given that the insolvent will attend from time to time the meetings of the Court in order to pass his final examination. The discretion vested in the Court of Insolvency as to granting protection to an insolvent is not an arbitrary discretion, and must not be used for an indirect purpose.

In re Adcock 24

——— 4. *The Insolvent Act* 1886—*Part XI—Deed of Assignment—Order to set aside—Appeal against order—Requisite majority of creditors—Accidental omission.* In arriving at a decision as to whether the requisite number of creditors have assented to a deed of assignment under Part XI of The Insolvent Act 1886 the whole body of the creditors must be looked to, and not merely those mentioned in the schedule to the deed of assignment, even though the names of creditors not mentioned in the deed of assignment are accidentally omitted. *In re W. J. Hinde, an Insolvent* 168

——— 5. *The Insolvent Act* 1886—*Special case under clause* 37 *stated before decision of Court below—Jurisdiction of Supreme Court.* A Local Court of Insolvency must give a decision before remitting a question of law by way of special case to the Supreme Court, otherwise the special case will not be entertained. *In the matter of the Deed of Assignment of Richard Carruthers, and in the matter of an Application for the Appointment of a New Trustee* 34

——— 6. *The Insolvent Act* 1886: *sec.* 175, *sub-sec.* III. *sub-sec.* VIII. *and sec.* 4 — *Debt—Demand provable under insolvency — Imprisonment — Warrant and order of commitment — Appeal.* S. persuaded Mrs. R. to execute a transfer in blank of certain shares in the Broken Hill Proprietary Mining Company Limited and to hand the transfer to him. S. sold the shares and was subsequently adjudicated insolvent.

It was alleged that S. had fraudulently represented to Mrs. R. that the transfer was a transfer of certain other shares, and that S. had fraudulently used the shares transferred.

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The Court of Insolvency ordered S. to be imprisoned for six months on the ground that he had contracted a debt with Mrs. R. by means of fraud or false pretences.

Held, that the claim of Mrs. R. was not such a debt as was contemplated by sub-section III. of section 175 of The Insolvent Act 1886, and that the warrant and order for commitment were improperly framed and did not set forth sufficient causes for the imprisonment, and that the appeal must be upheld.

In re V. J. Solomon, an Insolvent 170

INSOLVENT ACT 1886. See Life Assurance Acts. 1.

INSURANCE POLICY PAYABLE BEFORE DEATH. See Life Assurance Acts. 1.

INTERIM ORDER. See Injunction. 2.

INTEREST, DECLARATION AGAINST. See Libel.

——— MORTGAGE DEBT AND. See Insolvency. 1.

JURISDICTION OF SUPREME COURT. See District Councils Act 1887.

——————————— See Insolvency. 5.

LADING, BILL OF. See Charter Party.

LANGUAGE, INDECENT. See Police Act 1869-70.

——— OBSCENE. See Police Act 1869-70.

——— OF ACTS ACT 1872. See Stamp Act 1886.

LIABILITY OF ASSIGNOR-PURCHASER TO MORTGAGEES. See Insolvency. 1.

——— MARRIED WOMAN. See Married Women's Property Act 1893-4.

LIBEL—*Rules of Court—Pleading — Demurrer — Application to strike out pleading—Notices in "Government Gazette"—Hansard reports of Parliamentary debates — Privileged occasion — Declaration against interest.* Notwithstanding that a pleading might formerly have been demurrable at Common Law, and now might be struck out on an application in Chambers prior to trial, under Rule 4 of Order LXIII of the Rules of the Supreme Court, or otherwise the Court will not as of course strike out such a pleading on an application made on the trial of the case.

Notices in *Goverment Gazette* and "Hansard" reports of debates in Parliament are inadmissible in evidence to prove the truth of assertions made in such notices and debates respectively.

A public writer who makes assertions with regard to individuals has not the privilege that a master has in giving a character of his servant.

A declaration or statement by a deceased selector under an agreement for the purchase of land upon credit under "The Waste Lands Alienation Act 1872" that he was the agent or trustee of another person who was alleged to have advanced and lent the moneys payable and paid under such agreement is admissible in evidence as a declaration against interest.

Hutchison v. *Mather and Another* 73

LICENSE, MINING. See Gold Mining Act 1885.

LICENSED HAWKERS ACT 1863—*The Municipal Corporations Act* 1880—*Hawker's License.* A person who holds a hawker's license from the Treasurer under the Licensed Hawkers Act 1863 may hawk and carry about goods in accordance with his license within the limits of a municipality without procuring a hawker's license from the corporation of such municipality. *Shakespeare* v. *Sauer* 4

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LIFE ASSURANCE ACTS. 1. *Life Assurance Companies Act* 1882—*Life Assurance Companies Act Amendment Act* 1885—*The Policies Protection Act* 1887—*The Insolvent Act* 1886—*Insurance policy payable before death—Endowment policy.* On 31st December, 1872, D. effected an endowment insurance for £500 with the Australian Mutual Provident Society Limited, payable, with bonus additions, on 31st December, 1894, or at the death of D. before that date.

On 12th October, 1888, D. was adjudicated insolvent on his own petition, and the said insurance was then subsisting.

Held (Way, C.J., *dissentiente*), that the policy of the said insurance did not vest in the trustees of the insolvency of D., but is protected.

It was not decided whether the policy was protected by The Policies Protection Act 1887 or by the Life Assurance Companies Act Amendment Act 1885.

In the Matter of Joseph McAfee Donaldson, an Insolvent 141

——————— 2. *Life Assurance Companies Act* 1882—*The Policies Protection Act* 1887—*Equitable mortgage of policy of assurance—Administration.* The provisions of the Life Assurance Companies Act 1882 and The Policies Protection Act 1887 do not deprive an equitable mortgagee of a life policy of insurance of his security. *The Bank of South Australia Limited* v. *Kingdon* 53

LIGHTERAGE. See Charter Party.

LIQUIDATION. See Company. 1 and 4.

LOCAL COURT, APPEAL TO. See District Councils Act 1887.

MAJORITY OF CREDITORS REQUISITE. See Insolvency. 4.

MALPRACTICE. See Injunction. 1.

MANDAMUS. See Gold Mining Act 1885.

——————— See Medical Acts.

MARRIED WOMEN'S PROPERTY ACT 1883-4—*Action for debt—Separate estate—Liability of married woman.* In an action for debt against a married woman the plaintiff must prove that at the time the debt was contracted the defendant had separate property. This not being proved in this action,

Held, that the plaintiff must be nonsuited.

Harrold v. *Snowsill* 59

MATRIMONIAL CAUSES ACT 1867—*Order to witnesses to leave Court—Parties to action—Co-respondent.* On the trial of a suit for dissolution of marriage if an order be made that witnesses leave the Court, a co-respondent who appears and defends will not necessarily be ordered to leave the Court during the giving evidence by the respondent. *Anderson* v. *Anderson and Clindening* 120

MEANING OF WORD "CONVENE." See Insolvency. 2.

MEDICAL ACTS—*Ordinance* 17 *of* 1844—*The Medical Act* 1880—*Medical board—Power of Board—Qualification of applicant for registration—Madamus—Practice.* B. was granted a degree of doctor of medicine by the Hahnemann Medical College at Chicago, in the state of Illinois, in the United States of America, and also a certificate by the State Board of Health of the said state of Illinois, by virtue of which B. was entitled to practise medicine in that state, and hold medical government appointments.

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It was proved that on production of his certificate by B. in the other states of the United States of America, that B. was entitled as of course to be granted a certificate to practise medicine and hold medical government appointments in those states.

On a motion for rule absolute for mandamus to be directed to the South Australian Medical Board commanding that Board to register B. as a duly qualified medical practitioner in this province,

Held, that B.'s qualifications entitled him to be so registered, and rule made absolute.

In re George Bollen and *In re The South Australian Medical Board* ... 107

MEETING OF CREDITORS PRIOR TO PETITION BY DEBTOR. See Insolvency. 2.

MEMBER OF STOCK EXCHANGE. See Injunction. 2.

——— NOTICES OF CHARGES TO ACCUSED. See Injunction. 2.

——— RIGHTS AND PRIVILEGES OF. See Injunction. 2.

——— SUSPENSION OF. See Injunction. 2.

MEMBERSHIP. See Injunction. 1.

MEMORANDUM OF MORTGAGE, CERTIFIED COPY OF. See Real Property Acts.

MINER'S RIGHT. See Gold Mining Act 1885.

MINING LICENSE. See Gold Mining Act 1885.

MORTGAGE, DEBT AND INTEREST. See Insolvency. 1.

——— ——— MEMORANDUM OF, CERTIFIED COPY OF. See Real Property Acts.

——— ——— OF POLICY OF ASSURANCE, EQUITABLE. See Life Assurance Acts. 2.

MORTGAGED PROPERTY. See Insolvency. 1.

MORTGAGES, LIABILITY OF ASSIGNOR-PURCHASER TO. See Insolvency. 1.

MUNICIPAL CORPORATION ACT 1880. See Licensed Hawkers Act 1863.

NONSUIT. See Injunction. 1.

NOTE, PROMISSORY. See Stamp Act 1886.

NOTICE OF CHARGES TO ACCUSED MEMBER. See Injunction. 2.

——— TO ACCUSED MEMBER. See Injunction. 1.

NOTICES IN "GOVERNMENT GAZETTE." See Libel.

OBSCENE LANGUAGE. See Police Act 1869-70.

OCCASION, PRIVILEGED. See Libel.

OMISSION, ACCIDENTAL. See Insolvency. 4.

ORDER, APPEAL AGAINST. See Insolvency. 4.

——— INTERIM. See Injunction. 2.

——— OF COMMITMENT, WARRANT AND. See Insolvency. 6.

——— TO SET ASIDE. See Insolvency. 4.

——— TO WITNESSES TO LEAVE COURT. See Matrimonial Causes Act 1867.

ORDINANCE 17 OF 1844. See Medical Acts.

PARLIAMENTARY DEBATES, HANSARD REPORTS OF. See Libel.

PARTIES TO ACTION. See Matrimonial Causes Act 1867.

PARTY AS SUITOR AND COUNSEL, APPEARANCE BY. See Injunction. 1.

PERFORMANCE. See Specific Performance.

PETITION, AFFIDAVIT VERIFYING. See Company. 3.

——— ——— BY COMPANY FOR WINDING UP OF OTHER COMPANY. See Company. 3.

——— ——— BY DEBTOR, MEETING OF CREDITORS PRIOR TO. See Insolvency. 2.

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PLEADING. See Libel.

————, APPLICATION TO STRIKE OUT. See Libel.

POLICE ACT 1869-70, Sec. 59—*Indecent language.* In the Police Court, Port Augusta, the defendant was fined for using the following language to the complainant—"Go out of this, you went down the country to get a kid;" or, "You went down the country and brought that kid back."

Held, that these words were not indecent or obscene.

Mitchell v. *Frankham* 114

POLICY OF ASSURANCE, EQUITABLE MORTGAGE OF. See Life Assurance Acts. 2.

POLICIES PROTECTION ACT 1887. See Life Assurance Acts. 1 and 2.

POLICY, ENDOWMENT. See Life Assurance Acts. 1.

POWER OF BOARD. See Medical Acts.

POWER OF WARDEN. See Gold Mining Act 1885.

PRACTICE. See Medical Acts.

———— See Specific Performance.

PRIVILEGED OCCASION. See Libel.

PRIVILEGES OF MEMBERS, RIGHTS AND. See Injunction. 2.

PROMISSORY NOTE. See Stamp Act 1886.

PROPERTY IN SOUTH AUSTRALIA. See Company. 4.

————, POSSESSION OF BY CLUB. See Injunction. 1.

PROTECTION. See Insolvency. 3.

QUALIFICATION OF APPLICANT FOR REGISTRATION. See Medical Acts.

RACING CLUB. See Injunction. 1.

RATE. See District Councils Act 1887.

REAL PROPERTY ACTS—*Real Property Act of* 1861—*The Real Property Act* 1886—*The Evidence Act* 1852—*Evidence—Certified copy memorandum of mortgage—Certificate of registration.* A copy of a memorandum of mortgage under the Real Property Act of 1861, signed and certified as a true copy by the officer to whose custody the original is entrusted, is receivable in evidence under The Evidence Act 1852.

The form—"Particulars entered in the Register Book, vol.
"fol. the day of
" 18 at noon.
"Registrar-General"
with a distinguishing number, sufficiently complies with ss. 37 and 38 of the Real Property Act of 1861.

Price v. *Price* 121

RECEIPT AND VOUCHER DEPOSIT. See Stamp Act 1886.

RECTIFICATION OF REGISTER. See Company. 2.

REGISTER, RECTIFICATION OF. See Company. 2.

REGISTRATION, CERTIFICATE OF. See Real Property Acts.

———— QUALIFICATION OF APPLICANT FOR. See Medical Acts.

REMOVAL OF CONTRIBUTORY ON APPLICATION OF CO-CONTRIBUTORY. See Company. 2.

REPORTS OF PARLIAMENTARY DEBATES, HANSARD. See Libel.

REPURCHASE BY ASSIGNOR FROM TRUSTEE OF MORTGAGED PROPERTY AFTER EXECUTION BY ASSIGNOR OF STATUTORY DEED OF ASSIGNMENT. See Insolvency. 1.

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RIGHT, MINER'S. See Gold Mining Act 1885.

——— OF SHAREHOLDER, CREDITOR, OR CONTRIBUTORY TO BE HEARD ON APPLICATION TO A JUDGE BY LIQUIDATORS. See Company. 1.

RIGHTS AND PRIVILEGES OF MEMBER. See Injunction. 2.

RULES OF CLUB. See Injunction. 1.

——— OF COURT. See Libel.

——— OF EXCHANGE. See Injunction. 2.

SECURITY FOR COSTS. See Insolvency. 3.

SEPARATE ESTATE. See Married Women's Property Act 1883-4.

SHAREHOLDER, CREDITOR, OR CONTRIBUTORY TO BE HEARD ON APPLICATION TO A JUDGE BY LIQUIDATORS, RIGHT OF. See Company. 1.

SPECIAL CASE. See District Councils Act 1887.

——————— UNDER CLAUSE 37 STATED BEFORE DECISION OF COURT BELOW. See Insolvency. 5.

SPECIFIC PERFORMANCE—*Title - Variation—Abatement—Compensation—Practice.* The parties to this action entered into an agreement, dated the 27th August, 1888, whereby the plaintiff company sold to the defendant all the extensive freehold and leasehold properties of the plaintiff company, situated in various parts of Adelaide, North Adelaide, and Glenelg.

The properties were specifically described in the schedules to the agreement, and therein set out in lots.

The properties comprised in two of the lots (in the schedules to the agreement referred to as lots 44 and 45), were leasehold, and the leases contained covenants by the lessee to expend certain moneys in buildings, within a certain time, upon the lands comprised in the leases.

The various properties, other than lots 44 and 45, were widely separated. Lots 44 and 45 were divided from one another by Molesworth-street.

As to lot 45, the plaintiff company expended considerably more money on building than was required by the covenant in the lease of that lot.

The plaintiff company did not expend any moneys in building on the land comprised in the lease of lot 44, and did not in any way comply with their covenant in this respect.

The lessors of lot 44 accepted rent after the time for performance of the covenant as to building had expired, and negotiations were entered into between them and the lessees (the plaintiff company) for an extension of the time for performance of the covenant.

The defendant made certain requisitions which the plaintiff company asserted they answered and complied with.

It was alleged by the plaintiff company that the acceptance of rent by the lessors of lot 44 was a waiver of forfeiture for the breach of covenant, and that lot 44 is valueless and is a small and immaterial portion of the subject matter of the contract, and in no way affects the enjoyment of any other part of the property sold, and that the lease thereof was valid and subsisting, but nevertheless the plaintiff company submitted to such compensation (if any) as the Court might order.

On November 14, 1888, the defendant rejected the titles to the property sold, and refused to perform the contract which he admitted he had made, and he denied that the plaintiffs had answered and complied with his solicitor's requisitions. The defendant also denied the expenditure on lot

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45 as alleged by the plaintiff company, and generally traversed the allegations of the plaintiff's claim, and then proceeded to specifically point out various objections to the plaintiff's title and to the non-fulfilment of several conditions contained in the agreement between the parties, the most material of which are that the leases of lots 44 and 45 are not valid and subsisting leases, by reason of the breaches by the plaintiff company of the covenants therein contained, to expend not less than a certain sum of money within a limited time, and to the reasonable approval of the lessors, their agents or architect, in the erection of a substantial and well-finished dwelling-house upon each of the acres and portions of an acre of land, the subject matter of the said leases. Further, the defendant said that the plaintiff company did not comply with the defendant's solicitor's requisition requiring: 1. The approval by the lessors of the leasehold properties Nos. 44 and 45, or their agents or architect of the dwelling-house erected thereon; and 2. The consent in writing of the lessors to the sale and purchase of the leasehold properties, which approval and consent the plaintiff company agreed, but in fact failed to obtain and produce. The defendant further said that the plaintiff company was unable to give possession of the whole of the lands agreed to be sold in the said agreement; that the lease of No. 44 is of considerable value, and forms a material portion of the subject matter of the contract; that as to the leasehold property No. 45, if the plaintiff company had expended as alleged, three times the sum required by the lease thereof to be expended (which the defendant denied), such moneys had not been expended in accordance with, and do not satisfy the covenants contained in the said lease; that the contract in this case is one whole and entire contract for the sale and purchase of all the properties set forth in the first and second schedules thereto for a lump sum of £155,000, and that the plaintiff company is not entitled to compel the defendant to accept part thereof, subject to an abatement, or on payment of a compensation.

Held, that the plaintiff company are entitled to a decree, as follows:—That as to the requisitions or objections of the defendant to leasehold lot 45, the lease thereof is valid and subsisting, and that the plaintiffs have made a good title thereto, and that the plaintiffs are entitled to specific performance of the agreement dated August 27, 1888, in the pleadings mentioned, subject to a deduction of the sum of £2,832 10s. for compensation in respect of lot 44: Provided that plaintiffs can make a good title to the freehold and leasehold premises, other than lot 44, so far as respects the matter of the requisitions and objections upon the said title mentioned in each and all of the exhibits marked A (being the defendant's solicitor's requisition); the exhibit marked B (being the defendant's rejection of title); and the exhibit marked C (being the particulars and objections in this action): Declare—That the lease of lot 44 is not valid and subsisting, and that the plaintiffs have not made a good title thereto, but that the said lot is not material to the possession or enjoyment of the remainder of the premises purchased; that a deduction of £2,832 10s. ought to be made from the purchase money in respect thereof; declare: that the defendant is bound to accept the title of the plaintiffs to the other freehold and leasehold premises mentioned in the said agreement, subject to the aforesaid

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requisitions and objections upon the said title. Decree accordingly, and let the following enquiries be made, that is to say:—1. An enquiry whether a good title can be made to the said premises, other than lot 44, having regard to the said requisitions and objections comprised in exhibits A, B, and C.

City of Adelaide Land and Investment Company Limited v. *Bent* ... 6

STAMP ACT 1886, SECTION 30—*Bank—Deposit Receipt and Voucher—Promissory Note—Language of Acts Act* 1872. A fixed deposit receipt, and a deposit receipt at call, in the following words and figures were granted by the Federal Bank of Australia Limited to Wm. Longbottom:—

Fixed Deposit Receipt.

No. 999. Due 31st August, 1889.

The Federal Bank of Australia Limited.

(Royal Arms.)

£100. Adelaide, 31st August, 1888.

Received from Wm. Longbottom the sum of one hundred pounds stg. to be placed to his credit for twelve months fixed on deposit account with this bank bearing interest during that period at the rate of 5 per cent. per annum and in the terms detailed by the depositor in his paid in voucher of this date.

L.S.

For the Federal Bank of Australia Limited,

Entered—Henry D. Cook, Accountant. William Neil, Manager.

This receipt must be produced when the money is called for.

[Not transferable.]

Deposit Receipt at Call.

No. 250.

The Federal Bank of Australia Limited.

(Royal Arms.)

£100. Adelaide, 31st August, 1888.

Received from Wm. Longbottom the sum of one hundred pounds stg. to be placed to his credit on deposit receipt with this bank on terms agreed on by him as detailed in his paid in voucher to this bank of this date.

L.S.

For the Federal Bank of Australia Limited,

Entered—Henry D. Cook, Accountant. William Neil, Manager.

This receipt must be produced when the money is called for.

[Not transferable.]

The above receipts, together with certain vouchers set out in the special case (a copy of which appears *infra*), formed the whole agreement between the parties.

Held, that these receipts are not promissory notes within the meaning of clause 30 of the Stamp Act 1886, and therefore not chargeable with stamp duty.

Held also, that the words "document or writing" in that clause cannot be construed by virtue of the Language of Acts Act 1872 to mean "docu-

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ments or writings," as such construction would be inconsistent with the context or subject matter of the clause.

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STATUTES—No. 4 George II. c. 28. See Specific Performance.
17 of 1844. See Medical Acts.
12 and 13 Vict. sec. 106. See Insolvency. 3.
2 of 1852. See Real Property Acts.
16 of 1860. See Insolvency. 1.
22 of 1861. See Real Property Acts and Insolvency. 1.
3 of 1863. See Licensed Hawkers Act.
13 of 1864. See Company. 1. 2. 3. 4.
3 of 1867. See Matrimonial Causes Act.
15 of 1869-70. See Police Act.
33 and 34 Vict. cc. 61, 97. See Stamp Act.
9 of 1872. See Stamp Act.
18 of 1872. See Libel.
123 of 1878. See Libel.
190 of 1880. See Licensed Hawkers Act.
193 of 1880. See Medical Acts.
232 of 1881. See Insolvency. 2.
277 of 1882. See Life Assurance Acts. 1. 2.
300 of 1883-4. See Married Women's Property Act.
314 of 1884. See Libel.
275 of 1882. See Libel.
353 of 1885. See Gold Mining Act.
417 of 1885. See Life Assurance Acts. 1.
372 of 1886. See Stamp Act.
385 of 1886. See Insolvency. 2. 3. 4. 5. 6.
Also Life Assurance Acts. 1.
380 of 1886. See Real Property Act.
417 of 1887. See Life Assurance Acts. 1. 2.
419 of 1887. See District Councils Act.

STATUTORY DEED OF ASSIGNMENT. See Insolvency. 1.

STOCK EXCHANGE. See Injunction. 2.

SUBMISSION BY ACCUSED MEMBER OR OTHER PERSON TO ARBITRATION. See Injunction. 1.

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CASES

DETERMINED IN THE

SUPREME COURT OF SOUTH AUSTRALIA.

In the Supreme Court.—In Banco.

FULL COURT
WAY, C.J.

1889
April 3.

IN RE RUDOLF FISCHER.

The Insolvent Act 1886, *section* 85—*Meeting of creditors prior to petition by debtor—Adjudication—Meaning of word "convene."*

An insolvent debtor cannot be adjudicated on his own petition before the time appointed for the holding of the meeting of creditors required by section 85 of "The Insolvent Act 1886."

The word "convene," as used in section 85 of "The Insolvent Act 1886," means there "bring together," not merely "call together."

SPECIAL case from the Local Court of Insolvency, Moonta.

F. called a meeting of his creditors, and between the date of the sending of circulars convening the meeting and the time appointed for the holding of the meeting the Local Court of Insolvency, Moonta, adjudicated him insolvent on his own petition.

The question for the opinion of the Supreme Court was—Whether the insolvent had sufficiently complied with section 85 by merely sending out circulars calling a meeting of his creditors in order to warrant an adjudication of insolvency against him upon his own petition, or whether the meeting must have been actually held before he could be adjudicated on his own petition.

Uffindell, for a creditor—No meeting of creditors was required by the insolvency law till The Insolvency Act 1881 was passed. The

FULL COURT
1889
In re R. FISCHER.

Insolvent Act 1886 requires that the insolvent shall convene a meeting of his creditors prior to a petition by him against himself. Here the insolvent sent out notices on the 13th November, 1888, for a meeting to be held on the 19th November, 1888, and on the 14th and 16th of that month respectively he filed his declaration and petition, and was on 17th November, 1888, adjudicated insolvent by the Local Court of Insolvency, Moonta, and thus before the day of the proposed meeting of creditors availed himself of the provisions of The Insolvent Act 1886 and no meeting was held. I submit that the word "convene" used in section 85 of the Insolvent Act 1886 is equivalent to "hold." In Ogilvie's dictionary "convene" is said to mean "to come together," "to meet," "to assemble," "to associate," "to cause to come together," "to cause to assemble," "to cause to associate."

[WAY, C.J.—We certainly must give some effect to the clause.]

Uffindell—I would refer the Court to the Imperial dictionary, where the word "convene" has a primary and a secondary meaning.

[WAY, C.J.—I shall use the primary meaning unless the secondary meaning is necessary in order to give effect to the clause.]

Uffindell—Clause 262, which prescribes the manner in which the meeting of creditors shall be convened, says such meeting shall be "held." I also refer the Court to clause 64. Clause 264, sub-section vii., says the chairman shall decide whether the meeting is properly held. There cannot be a chairman until a meeting has been held. The holding of a meeting was evidently intended by the Legislature, otherwise why should there be a provision for a stay as mentioned in section 85 ?

[WAY, C.J.—There is a provision for a stay both before and after a meeting and until any adjournment.]

Uffindell—And also, your honor, until after a scheme or composition shall become binding or fail or be rejected by the Court, clause 86 is subject to clause 85, and clause 85 excepts an imprisoned debtor, and why ? Because he could not attend the meeting, and thus could not comply with the Act. Clause 262 is imperative; so is clause 264. The object of the stay of proceedings mentioned in clause 85 was to keep the estate intact till the holding of the meeting. The result of the meeting might be an act of insolvency, and the Act provides that to exhibit a false statement of assets and liabilities at a meeting is a misdemeanour.

Upton—The main issue for the decision of the Court is—Whether a man can petition after he has summoned a meeting and before the meeting is held. In Smith's Latin and English dictionary the Latin word "convenio" is stated to mean "to sue," "to summon before a tribunal." "Convene" means "summon."

[WAY, C.J.—"Convene" means "to bring together."]

Upton—The chairman's certificate says, "duly convened and held," and appears to distinguish between these words.

WAY, C.J.

WAY, C.J.—In this certificate the Legislature used two words instead of one. This question is not arguable. I look upon these proceedings as an impudent attempt to drive a coach and four through a plain provision of a very well drawn Act of Parliament. The Legislature intended to retain the privilege which was given to debtors in this colony some years ago, namely, that they could petition against themselves, but that privilege having been abused under the previous Act they decided not to allow this course to remain in force, and placed a judicious restraint on debtors. The Legislature decided not to allow an insolvent who is not imprisoned to petition against himself until his creditors have had an opportunity of pronouncing an opinion among themselves as to his affairs. If I were to adopt the view asked for by Mr. Upton I should be flying in the face of the dictionary that gentleman has cited, and should also have to find that the Legislature intended before a man petitioned for adjudication against himself that he should send out circulars to his creditors and immediately afterwards should file his petition for adjudication. It would require the clearest possible language to induce me to think that the Legislature intended anything so silly. I therefore find that before the insolvent can petition for adjudication against himself a meeting must be convened, and his creditors must be brought together within the meaning of section 85. Under the circumstances the case will be answered in favor of Mr. Uffindell. The answer will be that the decision of the Court was wrong, and that the adjudication ought to have been reversed; in other words, that the Local Court of Insolvency acted without any jurisdiction whatever.

Adjudication reversed, with costs in the Supreme Court and the Court below.

FULL COURT
WAY, C.J., and BOUCAUT, J.

In the Supreme Court.—In Banco.

SHAKESPEARE *v.* SAUER.

1889
April 9.

Licensed Hawkers Act 1863—*The Municipal Corporations Act* 1880—*Hawker's License.*

A person who holds a hawker's license from the Treasurer under the Licensed Hawkers Act 1863 may hawk and carry about goods in accordance with his license within the limits of a municipality without procuring a hawker's license from the corporation of such municipality.

APPEAL from Police Court, Adelaide.

The appellant being the holder of a hawker's license under the Licensed Hawkers Act 1863, hawked goods in Adelaide without a license from the Corporation of Adelaide.

At the Police Court, Adelaide, the appellant was convicted of hawking without a license from the Corporation of Adelaide, and now appealed against this conviction.

Nesbit for the appellant Sauer—The Municipal Corporations Act 1880, which gives power to corporations to make by-laws, *inter alia* providing for the licensing of hawkers within municipal boundaries, does not render nugatory the power of the Treasurer under the Licensed Hawkers Act 1863. The Treasurer can grant a license referring to any part of the province. The Municipal Corporations Act 1880 enables a man who wishes to limit his operations to a town to get a license from the corporation of the town, but that Act does not provide that a man who has a license from the Treasury cannot hawk within a municipality without obtaining a license from the corporation. If this had been intended it would have been provided for.

Wadey for the respondent Shakespeare—The Municipal Corporations Act 1880 gives the corporation power over all hawkers trading in the municipality irrespective of the Licensed Hawkers Act 1863. I contend that the two Acts are inconsistent, and that as the former Act gives corporations power to make by-laws as to hawkers, it thereby by implication repealed the Licensed Hawkers Act of 1863 so far as municipalities are concerned.

WAY, C.J. WAY, C.J., delivered the judgment of the Court.—It appears to me that there is no inconsistency between the two Acts referred to, as

one gives a general power to issue licenses to extend all over the province and the other empowers corporations to make by-laws under which licenses can be issued to hawk within municipal bounds. That being the case there is no repeal by implication, and the question as to whether the license issued under the Licensed Hawkers Act 1863 is valid must be answered in the affirmative. The conviction in the Court below must be quashed.

Conviction quashed.

BUNDEY, J.

In the Supreme Court.

1889

March 13, 14, 15, 19, 20, 21, 26, 27, 28, 29.

April 17.

CITY OF ADELAIDE LAND AND INVESTMENT COMPANY LIMITED *v.* BENT.

Specific Performance—Title—Variation—Abatement—Compensation—Practice.

The parties to this action entered into an agreement, dated the 27th August, 1888, whereby the plaintiff company sold to the defendant all the extensive freehold and leasehold properties of the plaintiff company, situated in various parts of Adelaide, North Adelaide, and Glenelg.

The properties were specifically described in the schedules to the agreement, and therein set out in lots.

The properties comprised in two of the lots (in the schedules to the agreement referred to as lots 44 and 45), were leasehold, and the leases contained covenants by the lessee to expend certain moneys in buildings, within a certain time, upon the lands comprised in the leases.

The various properties, other than lots 44 and 45, were widely separated. Lots 44 and 45 were divided from one another by Molesworth-street.

As to lot 45, the plaintiff company expended considerably more money on building than was required by the covenant in the lease of that lot.

The plaintiff company did not expend any moneys in building on the land comprised in the lease of lot 44, and did not in any way comply with their covenant in this respect.

The lessors of lot 44 accepted rent after the time for performance of the covenant as to building had expired, and negotiations were entered into between them and the lessees (the plaintiff company) for an extension of the time for performance of the covenant.

The defendant made certain requisitions which the plaintiff company asserted they answered and complied with.

It was alleged by the plaintiff company that the acceptance of rent by the lessors of lot 44 was a waiver of forfeiture for the breach of covenant, and that lot 44 is valueless and is a small and immaterial portion of the subject matter of the contract, and in no way affects the enjoyment of any other part of the property sold, and that the lease thereof was valid and subsisting, but nevertheless the plaintiff company submitted to such compensation (if any) as the Court might order.

On November 14, 1888, the defendant rejected the titles to the property sold, and refused to perform the contract which he admitted he had made, and he denied that the plaintiffs had answered and complied with his solicitor's requisitions. The defendant also denied the expenditure on lot 45 as alleged by the plaintiff company, and generally traversed the allegations of the plaintiff's claim, and then proceeded to specifically point out various objections to the plaintiff's title and to the non-fulfilment of several conditions contained in the agreement between the parties, the most material of which are that the leases of lots 44 and 45 are not valid and subsisting leases, by reason of the breaches by the plaintiff company of the covenants therein contained, to expend not less than a certain sum of money within a limited time, and to the reasonable approval of the lessors, their agents or architect, in the erection of a substantial and well-finished dwelling-house upon each of the acres and portions of an acre of land, the subject matter of the said leases. Further, the defendant said that the plaintiff company did not comply with the defendant's solicitor's requisition requiring: 1. The approval by the lessors of the leasehold properties Nos. 44 and 45, or their agents or architect of the dwelling-house erected thereon; and 2. The consent in writing of the lessors to the sale and purchase of the leasehold properties, which approval and consent the plaintiff company agreed, but in

fact failed to obtain and produce. The defendant further said that the plaintiff company was unable to give possession of the whole of the lands agreed to be sold in the said agreement; that the lease of No. 44 is of considerable value, and forms a material portion of the subject matter of the contract; that as to the leasehold property No. 45, if the plaintiff company had expended as alleged, three times the sum required by the lease thereof to be expended (which the defendant denied), such moneys had not been expended in accordance with, and do not satisfy the covenants contained in the said lease; that the contract in this case is one whole and entire contract for the sale and purchase of all the properties set forth in the first and second schedules thereto for a lump sum of £155,000, and that the plaintiff company is not entitled to compel the defendant to accept part thereof, subject to an abatement, or on payment of a compensation.

Held, that the plaintiff company are entitled to a decree, as follows:—That as to the requisitions or objections of the defendant to leasehold lot 45, the lease thereof is valid and subsisting, and that the plaintiffs have made a good title thereto, and that the plaintiffs are entitled to specific performance of the agreement dated August 27, 1888, in the pleadings mentioned, subject to a deduction of the sum of £2,832 10s. for compensation in respect of lot 44: Provided that plaintiffs can make a good title to the freehold and leasehold premises, other than lot 44, so far as respects the matter of the requisitions and objections upon the said title mentioned in each and all of the exhibits marked A (being the defendant's solicitor's requisition); the exhibit marked B (being the defendant's rejection of title); and the exhibit marked C (being the particulars and objections in this action): Declare—That the lease of lot 44 is not valid and subsisting, and that the plaintiffs have not made a good title thereto, but that the said lot is not material to the possession or enjoyment of the remainder of the premises purchased; that a deduction of £2,832 10s. ought to be made from the purchase money in respect thereof; declare: that the defendant is bound to accept the title of the plaintiffs to the other freehold and leasehold premises mentioned in the said agreement, subject to the aforesaid requisitions and objections upon the said title. Decree accordingly, and let the following enquiries be made, that is to say:—1. An enquiry whether a good title can be made to the said premises, other than lot 44, having regard to the said requisitions and objections comprised in exhibits A, B, and C.

THIS was an action for specific performance.

The facts and pleadings are more fully referred to in the judgment.

The Hon. C. C. Kingston, A.G., Q.C., for certain guarantors.

Sir J. W. Downer, Q.C., J. H. Symon, Q.C., and *E. P. Nesbit* for the plaintiff company.

H. E. Downer, Grundy, and Solomon for the defendant.

The arguments will sufficiently appear from the judgment.

BUNDEY, J.—In this case the plaintiff company seeks to obtain a decree against the defendant compelling him to specifically perform his agreement with them of August 27, 1888, and to complete the purchase of the various freehold and leasehold properties set out and described in the schedule to such agreement. The defendant purchased certain freehold properties in the southern portion of the city of Adelaide and at Glenelg, and leasehold properties in the northern portion of the city called North Adelaide, viz. a block of

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seven acres, having frontages to Barnard-street, Molesworth-street, and Hill-street; and another block of two and three-quarter acres, with frontages to Buxton-street, Hill-street, and Molesworth-street. The leasehold block of seven acres has been referred to throughout the argument as "Lot 45," and the lesser block of two and three-quarter acres as "Lot 44;" and it will probably be convenient for me to continue to refer to them as such. The terms and conditions of the agreement, so far as they are necessary or material to this action, were set out in the plaintiff company's claim as follows:—The total purchase money was £155,000, £5,000 to be deposited on the execution of the agreement in the Bank of New Zealand at Melbourne to the joint account of Frederick George Moule and Theodore Fink, to be held for the period of two months, and then to be handed over to the plaintiffs. The further sum of £14,730 without interest to be paid at the office of the plaintiffs' solicitors in Adelaide, also within two months from the date of the said agreement, provided good title (subject to the mortgages thereinafter mentioned) be made out by that time, or so soon thereafter as a good title was made, and the sum of £135,270 (being the balance of the said purchase-money) was to be paid at the office of the plaintiffs' solicitors at Adelaide on February 27, 1889; that the plaintiff company's title to the property sold should be produced in Adelaide to the purchaser, or his solicitor, within seven days from the execution of the contract; but in the case of the leasehold properties the plaintiff should not be compelled to produce the lessor's title, and all objections to and requisitions on the title to any of the properties should be stated in writing and delivered to the plaintiffs' solicitors within twenty-one days after such production of the title, and all objections and requisitions not sent in within that time should be considered to be waived. The plaintiff company's claim further set forth that the defendant's solicitor made certain requisitions on the title within the said period of twenty-one days, which the plaintiff company in due time answered and complied with, and deduced and made a good title to the properties sold, concluding with the usual allegations of readiness and willingness to complete and to execute all proper conveyances and assignments. In the alternative the plaintiffs aver that as to certain leasehold properties, Nos. 44 and 45 in the contract mentioned, the same were held under two separate leases to John White, deceased, and provided for the expenditure by the plaintiff company of a certain sum of money in the erection of a substantial

and well finished dwelling-house upon each of the acres and portions of an acre of land comprised in the said leases. That three times the sum required was expended on No. 45, but no expenditure had been made on No. 44, of which the defendant at the time of the contract was fully aware. That the lease of No. 44 is of no value, forms a small and immaterial portion of the subject matter of the contract, and in no way affects the enjoyment of any other part of the property sold. That the lease of the property is still valid and subsisting, and the plaintiffs submit to make such compensation, if any, as the Court may adjudge. They further say that the defendant did not pay the £14,730 within the two months, and that the same still remains unpaid, and that the defendant, by a notice in writing, dated November 14, 1888, rejected the title of the property sold, and refused to perform his contract. To this the defendant replies admitting the contract, but denies that the plaintiffs answered and complied with his solicitor's requisitions. The defendant also denies the expenditure on 45 as alleged, and generally traverses the allegations of the plaintiffs' claim, and then proceeds to specifically point out various objections to the plaintiffs' title, and to the non-fulfilment of several conditions contained in the agreement between the parties, and the most material of which are that the leases of lots 44 and 45 are not valid and subsisting leases, by reason of the breaches by the plaintiff company of the covenants therein contained to expend not less than a certain sum of money within a limited time, and to the reasonable approval of the lessors, their agents or architect, in the erection of a substantial and well-finished dwelling-house upon each of the acres and portions of an acre of land, the subject matter of the said leases. Further, the defendant says that the plaintiff company did not comply with the defendant's solicitor's requisition, requiring—1. The approval of the lessors of the leasehold properties Nos. 44 and 45, or their agents or architect of the dwelling-houses erected thereon; and 2. The consent in writing of the lessors to sale and purchase of the leasehold properties, which approval and consent the plaintiff company agreed but in fact failed to obtain and produce. The defendant further says that the plaintiff company was unable to give possession of the whole of the lands agreed to be sold in the said agreement. That the lease of No. 44 is of considerable value, and forms a material portion of the subject matter of the contract. That as to the leasehold property, No. 45, if the plaintiff company has expended three times the sum required by the lease thereof to be expended (which the defendant

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denies), such moneys have not been expended in accordance with, and do not satisfy the covenants contained in the said lease. That the contract in this case is one whole and entire contract for the sale and purchase of all the properties set forth in the first and second schedules thereto for a lump sum of £155,000, and that the plaintiff company is not entitled to compel the defendant to accept part thereof subject to an abatement or on payment of a compensation. In order to properly understand the position of the properties it is necessary to state that Glenelg is several miles from the city of Adelaide, that the freehold land in the southern portion of the city is distant between one and two miles from the leasehold lots in North Adelaide, and that there are 44 lots in all, and 99 tenants occupying the various dwelling-houses on the properties. The leasehold lots 44 and 45 are not contiguous, but are divided by Molesworth-street. It will thus be seen that the properties (other than leasehold blocks 44 and 45) are widely separated. The evidence showed that the plaintiff company had expended upwards of £20,000 on the seven-acre block, No. 45, in erecting substantial villa residences. By the terms of their lease of this block they were only bound to expend £1,000 on each acre, or a total of £7,000. Block 44, which, as before pointed out, contains two and three quarter acres, is held under a separate lease, with a similar building covenant, a compliance with which would necessitate an expenditure of £2,750, and this covenant was to have been fulfilled before the 13th day of December, 1886. No portion of this has been expended, and the whole two and three-quarter acres is vacant land. By the terms of its lease, on the expiration of the period fixed for completing the building the lessor had the right to re-enter for a breach of this covenant, but he did not do so, and has continued to receive rent, with full knowledge of such breach, up to the date of the contract now under consideration. There have, however, been subsequent negotiations between the plaintiff company and the lessor to extend the time for the fulfilment of the building covenant. On lot 44 and throughout the lessor's agent has insisted on the right to have it duly carried out. Such was the position of matters when the contract was entered into between the plaintiff company and the defendant. The £5,000 deposit was duly lodged in the bank in Melbourne according to its terms, and the defendant's solicitor proceeded to make certain requisitions on the plaintiffs' title, which title it is alleged was produced to defendant's solicitor some time in October 1888. It was stated that the purchaser's

requisitions were sent in to the plaintiffs' solicitors on October 15, and were answered on the 31st of the same month. There are a number of these which it is unnecessary for me to refer to at present. The only ones to which I deem it essential to direct particular attention are contained in Mr. Solomon's (the defendant's solicitor) letter to the plaintiffs' solicitor of November 13, 1888:—"Widows' "Fund Buildings, Grenfell-street, Adelaide, November 13, 1888. "Messrs. Symon, Bakewell, and Symon, solicitors, Pirie-street, "Adelaide.—Dear Sirs—Bent, from the City of Adelaide Land and "Investment Company Limited. The undertaking produced by you, "in accordance with requisition No. 6, is signed by an attorney—I "shall require the production of the power of attorney, by virtue of "which the document is signed; also probate of the will of William "Petherbridge. Besides, there is a provision that interest must be "paid up to six weeks beyond the date of payment of principal. The "vendor company must agree to pay this. The copy certificate of death "of William Giles, produced, shows date of death May 11, 1862. In "the deed of appointment of June 26, 1867, registered No. 189, book "224, deposited No. 58, of 1880, the date of death is stated to "be May 9, 1862. This error must be rectified. I do not think "that the letter of the 30th ult. from Mr. J. B. Champion "to Mr. Oldham can in any way be considered a satisfactory "reply to the requisitions numbered respectively 15 and 23. A "proper consent to the sale of the leaseholds, and a waiver of the "covenants in the lease, by the lessors must be produced. I am still "waiting for you to produce other deeds and documents, promised in "replies to requisitions.—Yours faithfully, J. SOLOMON." By the terms of this letter the defendant's solicitor was making certain proper and substantial requisitions respecting the title, and there was nothing in the correspondence between the parties to indicate any intention on his client's part of terminating the contract. On the following day, however, viz. on November 14, 1888, notice in writing, rejecting the title on the grounds stated therein, was signed by the defendant in Melbourne, and forwarded to his solicitor in Adelaide, which notice of rejection was served on the plaintiff company's solicitors on November 16, 1888. Such notice is as follows:—"To the City of Adelaide Land and Investment Company Limited, "having its registered office at Nos. 6, 7, and 8 Currie-street, in the "city of Adelaide, in the province of South Australia, and to all "others whom it may concern.—Take notice that requisitions Nos.

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"2, 5, 6, 8, 11, 13, 14, 15, 19, 20, 21, 22, 23, 26, 28, 32, 33, 34, and 35, "on the titles to all and singular the freehold and leasehold lands "contracted to be sold by the City of Adelaide Land and Investment "Company Limited, to the Honorable Thomas Bent, of Melbourne, "member of the Legislative Assembly, not having been complied "with, and the answers thereto being unsatisfactory, and the vendor "company being unable to give possession of the whole of the lands "contracted to be sold, the purchaser, the said Thomas Bent, hereby "rejects the title to the said property contracted to be sold. Dated "at Melbourne the 14th day of November, 1888. Thomas Bent, "purchaser.— FINK, BEST & P. D. PHILLIPS, solicitors for the pur- "chaser, the said Thomas Bent." This was undoubtedly a very summary mode on the defendant's part of endeavoring to put an end to his contract, but of course if there were just cause for doing so the mode adopted is of secondary importance; and this brings me to the consideration of the grounds taken for such rejection, and whether the defendant has shown sufficient reasons in such notice or in any of his previous requisitions to legally justify him in refusing to complete his contract. Putting aside for the present the mere formal matters, and those which would be correctly described by the term "conveyancing requisitions," I will proceed to deal with the substantial matters raised by the defendant's pleadings and his learned counsels' contention respecting them. No evidence having been brought before me as to the alleged trifling deficiency in feet of the freehold property, and as this was barely mentioned and not insisted upon by the learned counsel for the defendant, and as the agreement specified such measurements were "approximate" only, I do not deem it necessary to further refer to it. Indeed, I have no data upon which to express an opinion. The great contest has been with respect to the title of leasehold lots 44 and 45, more especially the former. Summarising the main grounds taken by the defendant's counsel for rejecting the title of these lots, they are as follows:—1. The contract is indivisible, and only capable of being enforced as a whole, as it specifies that the defendant bought the whole of the plaintiff company's properties. 2. If it is indivisible it is impossible to sever the question of materiality of any substantial portion of the property. 3. That the leasehold properties are held under leases with stringent covenants, and that some of such covenants have been broken by the plaintiff company, viz. the covenant to build within a specified time and up to a certain value, and the

covenant not to assign without first having obtained the consent in writing of the lessor, the latter they contend being a condition precedent to the plaintiffs' right or power to make title. 4. That by the breach of the building covenant the lease of No. 44 has become forfeited to the lessor, and that the receipt of the rent by the lessor's agents (assuming that he had the necessary authority which is denied) is no waiver of the forfeiture, inasmuch as the evidence shows that it was never intended on either side that such acceptance of rent should alter the respective legal rights of the parties, but merely extended the time at the will of the lessor for fulfilling the covenant, and that the waiver or non-waiver of a forfeiture, by an acceptance of rent, is a question of the intention of the parties, to be determined by the Court, on the facts disclosed. 5. Assuming however, that the forfeiture would have been waived by the acceptance by a person legally empowered to receive the rent, there was no evidence of such authority in this case. 6. Even if the right of re-entry is gone, by the acceptance of rent by the lessor, still an action upon the covenant is maintainable, and that if this property was forced upon the defendant he would be liable to such an action, and possibly to a suit for specific performance of the covenant—a position which Courts of Equity have invariably refused to entail upon any purchaser—or, as put by Alderson B.—"Where there is a "reasonable decent probability of litigation the Court will not compel "the purchaser to buy a lawsuit." 7. That the leases Nos. 44 and 45 are not valid and subsisting leases, and that there was no power on the part of the lessor to waive any covenants in them as they were mere machines, subject to the will of the Court, which itself is subject to the provisions of the Settled Estates Act. 8. That No. 44 was a material and necessary part to the possession and enjoyment of the whole property purchased, or at least to the important lot 45. 9. That if it is decreed that the defendant shall take lot 44, then he should be placed in the position of having the necessary compensation allowed him to comply with the terms of the building covenant. The plaintiffs reply, traversing each of these contentions, and ask the Court to say—1. That the defendant's objection, by which he is bound, was not to the invalidity of the lease or whether it was determined, but that the plaintiff should procure and show a proper waiver of the covenants in the lease. 2. That subject to this, the lease is a valid and subsisting one. 3. That if not a valid and subsisting lease, it is not material to the possession

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and enjoyment of the rest of the property purchased. 4. That if not so material it is of no value, or of only trifling value. 5. That if the Court thinks it has any substantial value it will fix what compensation should be allowed. On the first and second points raised by the defendant's counsel I have found comparatively little difficulty in deciding adversely to their contention. To give effect to them would be to upset decisions, in which relief has been given, where purchases of several lots have been made, and the terms embodied in one entire contract, whether such purchases were at public auction or by private contract. It is true that the defendant bought the whole of the plaintiff company's properties, but each separate lot was scheduled, specified, described, and defined in the agreement. I have read the cases cited as bearing on this point, but they do not appear to me to conflict with the view just stated. So far as the third point relates to the alleged condition precedent, viz. the obtaining the lessor's consent in writing to the assignment, I am of opinion the time had not arrived when such a license was wanted. I think the case of *Ellis* v. *Rogers* (L.R. 29 Ch. Div. 661) is conclusive on this subject. It is therefore unnecessary at present to consider the sufficiency or otherwise of the evidence of such consent. This is, I think, a conveyancing matter. Before proceeding to deal with the much graver issues raised under the defendant's remaining points, viz. the doubtfulness of the plaintiff company's title to lot 44, the alleged forfeiture, the non-waiver of the breach, and the materiality of such lot, it may perhaps be well to refer shortly to some of the authorities dealing with the principles upon which Courts of Equity act in suits for specific performance, and which principle should guide my judgment and govern my decision in this case. A vast number of cases, and many dicta from eminent text-book writers were cited; it would, however, be as impossible as it is unnecessary to refer to the whole of these. Those most applicable to the present case are, I think, *Warde* v. *Dickson* (5 Jurist N.S. 698), in which Vice-Chancellor Kindersley says—"It is not necessary for "the defendant to say, 'I prove your title is bad;' but that he should "be able to say, 'I prove facts, which show that your title is at least "doubtful.'" *Casamajor* v. *Strode* (2 Mylne & Keen 708) in Sir Edward Sugden's argument—"The rule in equity is invariable and universal, never to force a purchaser to take a doubtful title." Lord Eldon, in *Knatchbull* v. *Grueber* (3 Merivale 140), holds that—"Equity does not compel a purchaser to take such a title as a willing

"purchaser might be satisfied with; but the Court will enquire whether "a title can be had, and if the title is defective as to part there is no "principle of equity more artificial than that which calls on the Court "to decide whether the purchaser shall be bound to take with any and "what compensation." In *Arnold* v. *Arnold* (L.R. 14 Ch. Div. 278) Lords Justices Bagallay, James, and Bramwell cite this dictum of Lord Eldon with approval, and Lord Justice James adds that he hopes the Court will continue in that course. In the same case Lord Justice Baggallay says—"But no case is present to my mind in which "pecuniary compensation has been given when the property to which "a title cannot be made is a material part of the property bought." These dicta of some of the intellectual legal giants of the past and present age clearly and sharply define a purchaser's rights, and a judge's duty in deciding upon them. Bearing these in mind I have now to consider whether the facts in the present case bring it within them. The learned counsel for the defendant founded a strong argument upon the case of *Nouaille* v. *Flight* (7 Beavan's Reports 521). In that case the lessee covenanted to build thirty-four additional houses on the demised property within five years, to keep in repair the houses built and to be built, and at the end of the term to deliver them up to the lessor; and there was a proviso for re-entry on non-performance of the covenants. The additional houses were not built, but for forty-six years the lessor received the rent, and thus waived the obligation to build, the leasehold interest being sold—held, first, that the covenant to deliver up extended to the additional houses, as well as to the houses built at the date of the demise; secondly, that the title was bad notwithstanding the purchaser might retain possession until the last day of the term, and then escape liability by transferring that day to a pauper; and, thirdly, that the purchaser was not bound to accept either a compensation or indemnity. It will be seen that in several respects that case bears a strong analogy to the present, and deserves the gravest consideration, but to my mind it is distinguishable. There the covenants to build, keep in repair, and deliver up, &c. went to and affected the title to the whole of the demised land, and consequently it would come within the rule so clearly laid down in the cases already cited; it was a bad title to the entire land demised. In the present case the great contest is whether or not the only part on which it can be suggested that *Nouaille* v. *Flight* (*sup.*) has any applicability is an immaterial portion, or whether it is material and

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necessary for the enjoyment of the remainder. Moreover, as pointed out by the Master of the Rolls in his judgment, it was impossible in that case to ascertain with any reasonable accuracy the amount or value of the liability for the non-erection of these twenty houses. In the present case such an insurmountable difficulty as this does not arise, as the covenant is limited to £1,000 upon each acre. The learned counsel for the plaintiff company stated that the covenants of the lease in *Nouaille* v. *Flight* (*sup.*) were dissimilar to those in the lease of lot 44, but I am not sure that their legal effect is not the same. Be that as it may, it is unnecessary from the view I take of this case, viz. that it does not conflict with the numerous decisions on the question of materiality to decide whether they are dissimilar or not. If the breach had extended to so material a portion as block 45 *Nouaille* v. *Flight* (*sup.*) would I think have been fatal to the plaintiff company, as it forms so considerable and valuable a portion of the property purchased. It is true that this point was not taken in Mr. Solomon's requisition, but if I thought *Nouaille* v. *Flight* (*sup.*) really governed this case I should allow the pleadings to be amended in order to raise it. This, it seems to me, would be clearly my duty—see *Baskcomb* v. *Phillips* (29 L.J. Chancery, 380)—where it was held that a bill will be dismissed if in the course of the suit it should appear that the lessor had a defective title, even though the objections on which the refusal to take the lease was grounded were frivolous and untenable. *Nouaille* v. *Flight* (*sup.*) is also an important case on several of the other questions involved in the present contention. It has a strong bearing on the next argument of the defendant's counsel to which I shall refer, viz. the non-waiver of the forfeiture by acceptance of rent by the lessor. They cited and pressed upon my attention the case of *Cheny* v. *Batten* (Cowper, 243), where Lord Mansfield is reported to have said—"The question there-"fore is *quo animo* the rent was received, and what the real inten-"tion of both parties was." I have read this case, and observe that it turned upon a question under stat. 4 Geo. II. c. 28; a lessor had given notice to quit, the tenant held over after the expiration of the notice, and thus became liable under that statute to pay double rent. The lessor subsequently accepted single rent, and the question was whether by such acceptance he had waived his right to the double sum, and it was held he had done so; but Aston, J., at page 247 of the same report says that acceptance of rent has been held a waiver of the forfeiture of a lease, which (he adds) may well be, for it is a

penalty, and by accepting the rent the party waives the penalty. It was rather startling to have this proposition even doubted. *Cheny* v. *Batten* (*sup.*) was decided in 1775. In 1877 *Davenport* v. *The Queen* (L.R. 3 App. Cases, 115) was determined. It was there held that, assuming a forfeiture, it was waived by the receipt of rent, and that a mere protest that it was accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt. In the judgment *Croft* v. *Lumley* (6 H.L.C. 725) was referred to, and the opinion of a very learned judge (Mr. Justice Williams) was cited in the following terms :—"It was "established as early as *Pennant's case* (Part 3 Co. Reps. 64A) that if a "lessor, after notice of a forfeiture of the lease, accepts rent which "accrues after, this is an act which amounts to an affirmance of the "lease and a dispensation of the forfeiture. In the present case the "facts, I think, amount to this, that the lessor accepted the rent, but "accompanied the receipt with a protest that he did not accept it as "rent, and did not intend to waive any forfeiture. But I am of "opinion the protest was altogether inoperative. As he had no right at "all to take the money unless he took it as rent, he cannot, I think, "be allowed to say that he wrongfully took it on some other account. "And if he took it as rent the legal consequences of such an act must "follow, however much he might desire to repudiate them." Turning to the evidence of Mr. Champion, it is clear that when he accepted the rent from the plaintiff company he always insisted on his right to enforce the covenants of the lease. From the case just cited, and assuming he was the lessor's duly constituted agent, such acceptance, notwithstanding this reservation, was a clear waiver of the forfeiture. On this point also the defendant's counsel raised two subsidiary issues, viz. that the lessors being trustees under the Settled Estates Act, they had no power to waive a forfeiture, that they were merely machinery subject to the will of the Court, and that the Court itself would be subject to the provisions of this special statute in approving or authorising any Act. With respect to these contentions they cited no authority; true it is that the Court cannot exercise a statutory power except strictly within the provisions of the statute, but when one of these provisions enables it to confer upon trustees power to grant building leases with all usual and necessary covenants, unless the statute expressly takes them away or limits them, I know nothing that deprives lessees under such leases of a tenant's ordinary common law rights, nor can I see anything in reason why this should be

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otherwise. What the position of the lessors with respect to the beneficiaries under the will, of which they are trustees, may be, if they have neglected their duty to the estate, is another matter. I express no opinion upon this. I now proceed to consider the crucial point in this case, viz. was lot No. 44 material and necessary to the enjoyment of the rest of the property? If it was, *Nouaille* v. *Flight* (*sup.*) applies, and the defendant is entitled to have this claim dismissed; if it was not, then the plaintiff company must succeed, upon such terms as to compensation as the Court may find to be just. In *Casamajor* v. *Strode* (*sup.* at p. 730) Lord Brougham said—"It may "therefore be concluded that in determining whether a purchaser "who fails to obtain a good title to one lot shall be let off "from his contract for another, the whole circumstances may be "examined in order to prove that the two contracts are one, by "showing that the two parcels are complicated together, and that upon "the whole transaction the Court will determine as a jury would the "question, did or did not the party purchase the one with reference to "the other; would he or would he not have taken the one had he not "reckoned upon having the other?" Applying this reasoning to the case under consideration, did the defendant purchase lot 44 with reference to the other properties and more especially with reference to the seven-acre lot 45? I mention this latter block because very early in the argument addressed to me by the learned counsel for the plaintiff I felt that the test was not whether lot 44 was material to the whole of the properties purchased by the defendant, but whether it was necessary to the enjoyment of so considerable and valuable a portion of his purchase as block 45, situated as it is on the opposite side of Molesworth-street. The oral evidence adduced by the plaintiff shows it was not necessary to the enjoyment of lot 45. It is true that Mr. Champion, one of the plaintiff's witnesses, in cross-examination stated that in his opinion it might in some way or another affect the value of the larger block, but this evidence was somewhat of a hazy and uncertain character, and was opposed to that of the two experts or skilled witnesses, Mr Wadham and Mr. Botting. In addition to such evidence I have, as a jury would do, personally inspected the *locus in quo*, and formed such conclusions as I think the view and investigation justified. I may remark that few if any of the cases cited at the bar tend in any great degree to assist in elucidating the difficulty here. In nearly all of them the question that arose was deficiency in area—doubtless a similar principle is involved in them,

viz. materiality. Here however the purchaser, if a decree be made against him, will obtain all he purchased, and subject to the conveyancing requisitions being satisfactorily complied with, a good title to each and every portion of his purchase (excluding for the moment the consideration of the title relating to block 44), and this in a transaction of very great magnitude. Now, whether lot 44 is considered from the standpoint of the relation it bears to the other portions of the property in pecuniary value or in area, its importance does not appear to be very great. The evidence shows that the total cost of the whole of the properties was £269,000, and out of that but £1,000 was paid for the lease of this block, and the witnesses Mr. Botting and Mr. Wadham stated that the lease at the time the contract was made with the defendant had depreciated in value from one-third to one-half. This evidence of depreciation accords with the amount the defendant agreed to pay the plaintiff company for the whole of the properties, viz. £155,000 — showing a net loss of £114,000 on the original cost price. This of course is not the test of the materiality of block 44, but it is one of the elements in considering its importance or necessity to the opposite block. It must also be borne in mind that the lease of block 44 was not purchased by the plaintiff company for some considerable time after they had acquired the lease of block 45, and the respective lots are held under separate leases. It is true they are held from the same lessors, and under similar covenants, but beyond this there is nothing to in any way connect them. Block 45 has been freely built upon, and is in every way complete in itself, and is in no way, so far as I can gather, directly or indirectly affected by the lesser distinct, and separate block No. 44. Undoubtedly the latter is a valuable site for building purposes, as it has frontages to three main streets, and as building sites in the city are continually decreasing it is to be hoped its value will steadily improve. After the most careful and anxious consideration upon the whole of the circumstances attending this purchase, and of the evidence which has been adduced, I am of opinion that the defendant's principal object in purchasing was the freehold and leasehold properties forming the great bulk of the subject-matter of this contract; that the whole of these, including lot 45, were independent of and cannot be injured by any defect in the title of lot 44, and that the latter is not material to the possession and enjoyment of the rest or any part of the rest of the properties purchased. Having arrived at this conclusion, the next question for

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determination is, was the lease to block 44 a valid and subsisting one, or was the title so defective that a Court of Equity ought not to compel a purchaser to take it without compensation? In my opinion (apart from the conveyancing questions to be determined on a reference to the Master) the evidence does undoubtedly disclose a defective title to this lot. I have already dealt with the question of the waiver of the forfeiture by the lessors' subsequent receipt of rent; but it is clear, from the case of *Nouaille* v. *Flight* (*sup.*), that an action upon the covenant remains, and as before pointed out the Court will not force a title upon a purchaser where there is a reasonable probability of litigation. The learned counsel for the plaintiffs contend that such an action is only maintainable at the expiration of the term on the covenant to yield up in good repair, &c., and that the measure of damages would be the injury to the reversion. I will deal with this subject presently. But whether the right of action is postponed or not, or whether the damages would be the injury done to the reversion, is to my mind of little importance; putting it on the lowest ground, it is at least doubtful, and such a title will not be forced upon a purchaser. The very arguments that have been raised show the uncertainty and difficulty which may possibly ensue. The learned counsel for the plaintiff company further argued that no action could be maintained against the defendant for the breach of the covenant to build, as such an action would only be against the original lessee or the plaintiff company. This is an extremely important point, and as it was only prominently brought under my attention in Sir John Downer's reply, I had not the advantage of hearing the views of the learned counsel for the defendant upon it, except in very general terms when urging the defendant's liability to an action, or possibly a suit for specific performance. I have, however, given it the best consideration in my power, and will now state a few reasons for doubting if the point is so clear as the learned counsel insisted. On looking at the lease of lot 44 I find that the covenant to build upon it is made by the original lessee, Mr. Walter Reynell, for himself, his executors, administrators, or assigns. In *Spencer's case* (1 S.L.C. 68) "It was resolved in this case, that if the lessee had covenanted "for him and his assigns that they would make a new wall upon some "part of the thing demised, that forasmuch as it is to be done upon "the land demised, that it should bind the assignee: for although the "covenant doth extend to a thing to be newly made, yet it is to be "made upon the thing demised, and the assignee is to take the benefit

"of it, and therefore shall bind the assignee by express words." In Woodfall (p. 147) it is stated that the general rule appears to be that covenants concerning something touching the land, but not in being at the time of the demise, bind the assignees if named, otherwise not; and in Williams on Real Property (13th edition 397) it is laid down that the assignee of a lease is liable on all covenants that run with the land, and that he is bound to perform a covenant to keep the demised premises in repair. Now I am not forgetful of the fact that the breach here of the building covenant was in 1886. An assignee may only be liable for such covenants as run with the land, which may be broken during the time that the term may be vested in him, and not after he has assigned it over to another person (see Williams on Real Property, 13th edition 397), but here the evidence is that the lessor expressly reserved all his rights on this covenant, although he lost his remedy by forfeiture by acceptance of rent subsequently. I do not stop to enquire whether the non-enforcement of this remedy would or would not be a good consideration for extending the time of performance up to the date of the contract with the defendant, or whether there is sufficient in the letters from the plaintiff company on this subject to support an action; they have been disclosed in the course of the investigation, and it is clear the plaintiff company considered themselves liable to fulfil the covenant to build if there is a probability of its giving rise to litigation that is sufficient for the defendant's case. It was held in *Nouaille* v. *Flight* (*sup.*) that the covenants to repair and deliver up were continuous covenants, and that an assignee was bound by them; there the lessor waived and lost the right by forfeiture as in this case; there the additional houses were to be built in five years, which had long expired—and yet it was held that the breach of the covenant in not building such additional houses entailed a liability upon a purchaser which rendered the title a bad one. It is upon these considerations my doubts have arisen as to whether it is so absolutely certain that the defendant is secure from any immediate liability for the plaintiffs' breach of their covenant. It is unnecessary for me to express any decided opinion on the point, supposing it to be even doubtful, that is all the defendant need prove; but his case as to lot 44 does not rest on this, if there is a future liability on the covenants to repair and fill up, that is sufficient. I think there is such a liability, and that *Nouaille* v. *Flight* (*sup*), so far as this lot is concerned, is in point, and that therefore the defendant has established his right to substantial

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compensation. I have had some difficulty in arriving at a satisfactory conclusion, founded upon some settled principle as to what the amount of such compensation should be. It would, as it seems to me, be highly inequitable and unjust to force upon the defendant a title in which there had been a distinct breach of a covenant to expend £2,750, and upon which covenant it is possible, if not probable, a successful action might be maintained against him (either immediately or in the future is of little importance) without placing him in the position of complying with its terms. The contention that houses which would cost only £2,750 if erected on the demised land would not increase its value is not in my judgment the test. What the purchaser had in view in buying it is impossible to say, but whatever he intended to do he is in my opinion entitled to have a clean and safe title to the land he purchased or such an amount in compensation as will effectually protect him against its defects. I am furnished with two means of arriving at what may be a just estimate of the allowance which should be made, viz. the amount of expenditure covenanted to be made by the plaintiff company on the land previous to its sale to the defendant, and the evidence of the two experts called by the plaintiff, Messrs. Wadham and Botting. The former said—"In my opinion if a purchaser bought a lease without a knowledge of the covenant to expend £2,750, he ought to receive this as compensation;" and the latter stated—"If a purchaser buys a lease, and afterwards finds an unfulfilled covenant to expend £2,750 on it, and the time for the fulfilment of the covenant is passed, he ought to receive the £2,750 as compensation. To this I think ought to be added reasonable remuneration for the time taken in erecting the buildings; six months would not be an unreasonable time for that. It was pressed upon me by the learned counsel for the plaintiff company that I ought to be guided by the evidence they called rather than by any impression I may have formed by an inspection of the properties. I the more willingly give effect to this contention because the plaintiff company's skilled witnesses only strengthen my "view" in both senses of the term; and agreeing with them as to the amount that ought to be deducted. I award and allow the defendant the sum of £2,832 10s. as compensation for the defective title of lot 44, which sum includes six months' interest at £6 per centum, according to Mr. Botting's estimate. With respect to the points raised by the defendant's counsel in reference to the buildings on lot 45, I am of opnion that (subject to the conveyancing requisitions being satisfac-

torily complied with) a good title has been made to this lot, and that *Hume* v. *Bentley* (5 De Gex, and Smale's Reps. 520) shows that a covenant to build in a particular manner, which has not been performed *modo et formâ*, but which has been substantially performed, satisfies a covenant of this description; indeed it would be strange were it otherwise. Here there was more than substantial fulfilment of the covenant. The plaintiffs were only bound to expend some £7,000, and they actually spent upwards of three times that amount in the erection of tasteful villa residences, and on each acre considerably more than £1,000 was expended, thus complying with the terms of the lease in both particulars. The decree will therefore be as follows:—That as to the requisitions or objections of the defendant to leasehold lot 45, the lease thereof is valid and subsisting, and that the plaintiffs have made a good title thereto, and that the plaintiffs are entitled to specific performance of the agreement dated August 27, 1888, in the pleadings mentioned, subject to a deduction of the sum of £2,832 10s. for compensation in respect of lot 44. Provided that plaintiffs can make a good title to the freehold and leasehold premises, other than lot 44; so far as respects the matter of the requisitions and objections upon the said title mentioned in each and all of the exhibits marked A (being the defendant's solicitor's requisitions), the exhibit marked B (being the defendant's rejection of title), and the exhibit marked C (being the particulars and objections in this action), declare—That the lease of lot 44 is not valid and subsisting, and that the plaintiffs have not made a good title thereto, but that the said lot is not material to the possession or enjoyment of the remainder of the premises purchased, that a deduction of £2,832 10s. ought to be made from the purchase-money in respect thereof. Declare—That the defendant is bound to accept the title of the plaintiff to the other freehold and leasehold premises mentioned in the said agreement, subject to the aforesaid requisitions and objections upon the said title. Decree accordingly, and let the following enquiries be made, that is to say:—1. An enquiry whether a good title can be made to the said premises other than lot 44, having regard to the said requisitions and objections comprised in exhibits A, B, and C. Adjourn further consideration and costs. Liberty to apply. Eighteen days were given the defendant in which to appeal, and the plaintiff company were allowed a similar period on the question of compensation if they desired to appeal.

FULL COURT
WAY, C.J., and BOUCAUT, J.

In the Supreme Court.—In Banco.

IN RE ADCOCK.

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May 2.

The Insolvent Act 1886—*Costs—Appeal by Insolvent—Security for costs—Protection—Discretion of Commissioner.*

On an appeal, interlocutory or final, by an imprisoned insolvent to the Supreme Court that Court may order the appellant to find security for costs.

If no sufficient reasons (instances of which are given in the judgment of Way, C.J., *infra*) be shown to the contrary it is the duty of the Court of Insolvency to grant protection to an imprisoned insolvent on proper security being given that the insolvent will attend from time to time the meetings of the Court in order to pass his final examination. The discretion vested in the Court of Insolvency as to granting protection to an insolvent is not an arbitrary discretion, and must not be used for an indirect purpoes.

THIS was an appeal by an imprisoned insolvent from the decision of the Court of Insolvency, which Court refused to grant protection.

A. being an imprisoned insolvent whose protection had been withdrawn, proposed to appeal to the Supreme Court against the decision of the Commissioner of Insolvency, who refused to grant protection.

The trustees in the insolvency of A. asked that security for costs in the appeal be furnished by A.

J. H. Symon, Q.C., and *Oldham* for the trustees.

E. P. Nesbit and *Smith, LL.D.*, for the insolvent.

J. H. Symon, Q.C.—The insolvent has funds, and should give security for costs.

[WAY, C.J.—I think it clear that the insolvent has funds. He is always represented by more than one solicitor. If he has good grounds of appeal he will get his costs from the other side. If Adcock is entering into needless litigation he is oppressing his estate, and the other side are entitled to security.]

Nesbit—The insolvent came here from Melbourne voluntarily. I hope the Court will not allow my client to be harassed.

April 16.
WAY, C.J.

WAY, C.J., delivered the judgment of the Court on the interlocutory application for security for costs as follows:—This is a motion asking the Court to make an order for security for costs in an appeal from the Court of Insolvency. In order to justify us in directing that security for costs be given it is not necessary to give any expression of opinion on the merits of the case, and it is not necessary that the Court shall find that there has been any misconduct whatever on the part of the insolvent, or that he is a man possessed of a large amount of funds or a considerable amount of property. The reason underlying the general rule which obtains in England and in this colony, that security for costs must be given before a litigant

can enter upon appellate proceedings, is that it is done for the protection of the litigant on the other side in order to show that the appeal is *bona fide*. To show to the Court that there is some reasonable ground for appeal a deposit is required in England, and security of some kind, either by deposit or otherwise, is required in this colony. In order to satisfy the Court that the appeal is bona fide, and not for the purpose of harassing the litigant on the other side, it was asked that the insolvent in this case should give security of some kind. It was argued in a case cited by Mr. Symon that it must be assumed that the insolvent has no funds and is unable to make a deposit or give security, but the Master of the Rolls in that case disposed of the argument by pointing out that it was a matter of every-day experience that whether the insolvent had property or not for the purpose of litigation he had the control of funds, and in this particular case it is obvious that the insolvent has been enabled by the assistance of his wife or other sympathisers to engage in heavy litigation with the bank. That being the case there is no reason for relieving the insolvent of the guarantee in the appeal. If it could be shown that it was a denial of justice to the insolvent we might relax the rule, but the onus of showing that is not upon the successful litigant in the Court below, but upon the insolvent himself. If an additional reason be wanted for requiring security in this case it is found in the fact that this is an interlocutory and not a final appeal. We should scan more narrowly an application to relieve the insolvent of the burden of a general rule in an interlocutory appeal than in an appeal which would finally dispose of a litigation. Under those circumstances we find that the insolvent has not relieved himself of the ordinary burden imposed upon all appellants of finding security. The security will be fixed at what we consider not a prohibitive but a moderate sum, *i.e.* £50.

April 29.

The appeal now came on for hearing.

In February 1889 the insolvent was committed to prison on the withdrawal of his protection order, on the ground that he did not use the means within his power of procuring the production of certain books and documents belonging to his firm in Melbourne during the hearing of the proceedings in his insolvency in Adelaide. On March 22, 1889, after an examination of the insolvent extending over several days, an application was made for his protection to be restored, which application the Commissioner refused.

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In re ADCOCK.

Nesbit—The appellant was under process of examination in the Court of Insolvency by Mr. Symon on behalf of the trustee in insolvency, who was a nominee of the Town and Country Bank. This examination extended over nine or ten days during two or three months, and is apparently as near its conclusion now as when it began. I submit that the Court below erred in its discretion in refusing the application to release the insolvent and renew the protection order. In *Chard* v. *Jervis* (L.R. 9 Q.B.D. at page 182) occurs the passage—"We should be creating a new jurisdiction if we "were to send a man to prison, in order to oblige his wife to pay his "debts." The trustee in this case is attempting to work upon the feelings of the insolvent's wife and his son, in order to induce them to do something, which they would not do if they did not know that the insolvent was suffering imprisonment. Sec. 96 of The Insolvent Act 1886, dealing with the withdrawal of protection orders, was never intended as a means of putting an insolvent to the torture in a case of suspicion. The intention was simply to ensure the insolvent attending the Court for thorough examination. The respondent suggests that a certain deed of partnership made in July 1887 at the instance of the insolvent was fraudulent in intention as against the Town and Country Bank. At that time the firm of Adcock Brothers consisted of the insolvent, his brother (H. H. Adcock), and V. V. Brown, and was indebted to various creditors, including the Town and Country Bank. By the new deed of partnership two new members (Le Bas and the insolvent's son, who was in his twentieth year) were taken into the firm with £3,000 each of additional capital. Le Bas was a member as trustee for the insolvent's wife, and the new firm undertook to pay the creditors of the old firm, with the exception of the Town and Country Bank. Upon the suggestion of fraud, which has been made at a stage in the insolvent's examination when he had no opportunity of giving his version of the deed of partnership, certain books, which had always been the property of the new firm in Melbourne, were asked for, and because these books were not produced the insolvent's protection was withdrawn. The Court of Insolvency did not say that the deed of partnership was fraudulent, but it acted upon the assumption that it was not only fraudulent but an absolute nullity. The insolvent has been resident in Victoria for over forty years, and it has been stated without foundation that he is a subject of South Australia. There is no meaning in the term "subject of South Australia." The Court has no right to demand

the production of a solvent partner's books. *Ex parte Finch, Re Coverdale* (1 Dea. & Ch. 274). The Commissioner of Insolvency refused to restore the protection order on the ground that he believed Adcock "has sufficient control over his friends in Melbourne " to induce them to do what was requested."

Smith, LL.D.—When the petitioning creditors obtained an adjudication against Adcock they must have known that they put an end to the partnership of which he was a member, but as the servant of the new firm he cannot produce his employers' books in order to throw light on his insolvency, but has done all in his power to give information, and has voluntarily surrendered on his adjudication. I submit that the Court should remember that the liability which Adcock is now suffering from was incurred by a firm in which there were two other members who have assigned their estates.

[WAY, C.J.—Evidently he is the scapegoat for the firm.]

April 30.

Symon, Q.C.—The defence that Adcock has set up to the claim of his creditors is a frivolous and dishonest one. Messrs. McLean and Wood, who became sureties for the insolvent, had their debts expressly provided for by agreement before the new partnership was formed. All we want is that the insolvent should produce his books and enable his affairs to be thoroughly investigated and cleared up. The most frivolous pretexts have been advanced to put off the examination of the insolvent, and he is certainly not a man entitled to have the consideration of the Court when they come to consider the opposition he has shown in every way to the obtaining of evidence. I contend that the books were handed over to one Flood with a preconcerted idea of keeping them out of the hands of the insolvent. It is a most suspicious thing, and it is incumbent on the Court that while considering the creditors they must be careful of the commercial morality of the country. Considering the circumstances surrounding the case—and I will put aside everything but the matter of the books—the learned Commissioner was perfectly justified in saying he should withhold his hand till the trustees had more completely investigated the transactions of the insolvent, and would not grant him his liberty. It is a matter for the discretion of the Commissioner. The Supreme Court should not entertain an appeal from discretion. See the cases of *Ashworth* v. *Outram* (L.R. 5 Ch. D. 943), *Jarmayne* v. *Chatham* (L.R. 22 Ch. D. 493), *In re The Land and Sea Telegraph Construction Company, The Thames Plate Glass Company* v. *The Land and Sea Telegraph Construction Company* (25 L.T. N.S. 236). On the

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point that the Commissioner properly exercised his discretion and that the decision of the Commissioner should not be interfered with by this Court, see the cases of *Ex parte Burslem*, *Re Burslem* (9 L.T. N.S. 520), *Ex parte Butler*, *Re E. M. Butler* (9 L.T. N.S. 660), *Ex parte Quinn*, *Re Quinn* (10 L.T. N.S. 704), *Ex parte Mathews*, *Re Mathews* (10 L.T. N.S. 166). This Court must not look at any isolated act on the part of the Commissioner, but on his conduct throughout the whole of the case. The bank has been continually pressing the insolvent to pay his gigantic debt of £23,000 or £24,000, but he put them off from time to time, and there is no doubt that before he returned to the Territory he had formulated a scheme whereby the whole of his existing creditors, or at least a part of them, were to be defeated, the Town and Country Bank being among the number. Whereas Adcock said in his schedule that the assets of the firm would not exceed £8,500, still, when it was necessary for him to show that he could give security for costs in a libel action which he brought against a Mr. Solomon, he stated that the firm was worth £17,000. The insolvent in the course of the trial has constantly endeavored to interfere with the course of justice and had to be frequently reprimanded by the Commissioner for his impudence in the witness-box; indeed his whole conduct throughout reminds me of that of a witness named Coffey who was recently committed by the Court of High Commission. The question is whether this Court is prepared to interfere with the discretion of the learned Commissioner, and when the Court looks at the disgraceful way in which Adcock has given his evidence, I do not think the Court will give the insolvent the protection he asks for.

May 2.

Nesbit—The Supreme Court should not hesitate in controlling even what might be called the discretion of the Commissioner when that discretion has consequences involving the liberty of the subject. Indefinite imprisonment, as Mr. Justice Boucaut has said, is a relic of barbarism. The course of legislation from the time of the earliest bankruptcy laws to the present Insolvent Act has been one which was of greater humanity towards the insolvent, coupled with provisions for the purpose of securing to the creditors the proper distribution of the insolvent's property. In the English Bankruptcy Act of 1849 it was not considered necessary to make a provision that the bankrupt should be deemed to be in custody at the time of his adjudication if he were not already in custody. The main object of

sections 95 and 96 is that an insolvent can be placed in custody to ensure his attendance at his examinations until he passes his final examination.

[BOUCAUT, J.—In the original Act it was provided that in case an insolvent received a third-class certificate a judgment debt could be proceeded with against him in any Court.]

Nesbit—That was quite a separate provision, and is contained in sec. 191. The only pretext for withholding the protection is that the insolvent is keeping back books with a view of leading the Court astray, but when the books were produced the pretext was gone. The reasons why the Commissioner of Insolvency refused to grant protection were that the insolvent was withholding books, and that if allowed out of custody he might return to Melbourne and make entries in the books which would lead the Court astray, but since then Mr. Price has been to Melbourne and had free access to all the books, so that the first reason does not exist, while the second also is non-existent as the insolvent cannot now make any entries which would have any effect on the Court.

[WAY, C.J.—Are you prepared, Mr. Nesbit, to contend that the withdrawing of the protection was limited to securing the attendance of the insolvent at his examinations? If that be the case, however perverse an insolvent might be the Court would be powerless. Now I think it is a wholesome power to ensure discovery.]

Nesbit—I quite agree with your Honor. [He then quoted a case where an insolvent had absconded, and on returning was liberated on bail, and subsequently was given free protection in order that he might assist his creditors.] 'In Mr. Adcock's case the insolvent has come openly from Melbourne when he need not have come at all, and openly surrendered and gave bail.

[WAY, C.J.—I agree with Mr. Nesbit that any English tribunal having regard to the jealousy with which the liberty of the subject is regarded, would release an insolvent on bail if there were nothing in his conduct to prevent it.]

Nesbit—I also ask for bail on the ground that the insolvent should be given the means of defending himself against impending charges. In cases where grave criminal charges are laid against people bail is allowed them in this Court so that they may prepare their defence. Charges have been imputed by Mr. Symon from the first day, but there is nothing in the evidence so far to uphold them.

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[WAY, C.J.—Then it should be shown that the wife's separate estate was not abstracted from Mr. Adcock's estate. It should also be shown where the son got the money from to enter the new firm.]

Nesbit—There is not a tittle of evidence to the effect that Mrs. Adcock abstracted the money from her husband's estate.

[BOUCAUT, J.—That should be cleared up. It would not take long to do so.

WAY, C.J.—It is alleged that the assets of the old firm were transferred to the new firm for the purpose of excluding the principal creditor. The transaction bears on its face the impress of fraud. When Mr. Nesbit clears the case from the badge of fraud which admitted facts create it will be time for him to apply for his client's release, and he will have the assistance of the Court.]

Nesbit—I have never heard of a case in which the insolvent, pending certain charges, has had his protection order withdrawn.

[WAY, C.J.—I could mention many. Efforts had been made by the insolvent to evade the jurisdiction of the Court. The books were handed over to some third person on behalf of the wife of the insolvent, and a large proportion of his papers were left in Melbourne. I think that so far from any injustice having been done the Commissioner of Insolvency has shown an amount of forbearance that is surprising. That is my firm conviction.]

Nesbit—It would be highly premature at the present time to draw any presumption from the evidence on those points. A case of suspicion is by no means sufficient to warrant the Commissioner in acting as he did.

Symon, Q.C.—It is a pity Mr. Nesbit has not read all the the evidence.

[WAY, C.J.—The insolvent should have produced his books and made a clean breast of it. The Commissioner of Insolvency has acted with wonderful forbearance, and if I had been Commissioner I would have been satisfied with nothing less than the production of every book and scrap of paper.]

Nesbit—I think that was a position which the Commissioner had no right to take. There is no doubt Mrs. Adcock and young Adcock were *de facto* partners. They received and paid large sums of money, and the books are a record of their transactions. It is not sufficient to show suspicion to take away the protection order.

[WAY, C.J.—I do not believe the partners put any money into the new firm.]

WAY, C.J.—This is an appeal against the Court of Insolvency which refused to grant protection to the insolvent under sec. 96 of the Insolvent Act. Under our law of Insolvency, which is founded on the Imperial Bankruptcy Act of 1849, immediately upon surrendering an insolvent is in custody at the suit of the Official Receiver for such a sum as the Court directs, and if the Act ended there he would be imprisoned until he passed his final examination. But sec. 96 of the Act gives power to the Court to discharge an insolvent out of custody on his giving certain security mentioned in the Act, and also power to withdraw that protection, and furthermore grant further protection if subsequently the Commissioner thinks fit so to do. If we look at the literal language of the Act this granting of protection and discharge from custody pending the final examination of the insolvent is a pure matter of discretion with the Court of Insolvency, but as has been said again and again on both sides during the course of this argument, this discretion which is vested in the Court of Insolvency is not an arbitrary discretion, but a discretion to be exercised judicially and reasonably, and I am inclined to agree that if there be no reason shown to the contrary it is the duty of the Court of Insolvency to grant this protection on security being given that the insolvent will attend from time to time the meetings of the Court in order to pass his final examination. That was one object of the clause, but it was admitted with commendable candor by the learned counsel for the insolvent, Mr. Nesbit, that that was not the sole object, and that there may be other reasons for refusing the protection, such as misconduct or a persistent refusal to comply with the provisions of the Act, to answer questions proper during the course of the argument to be answered, refusal to produce books, refusal to make his estate available for distribution, or a strong suspicion on the part of the Court founded on reasonable evidence, although it might not be in a position to give a final decision on questions on either of these points, in my judgment they would be sufficient reasons for a refusal by the Court of Insolvency to grant protection to an insolvent. I quite agree with Mr. Nesbit in his emphatic protest that this discretion as to granting protection should not be used for an indirect purpose, and I am sure my learned colleague will agree with me when I say that I would not be a party to attempt to send a man to prison in order to compel his wife or any other person to pay his debts. I quite agree with every word that Mr. Nesbit has used in the course of his very able argument, both in

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WAY, C.J.

the opening and in his reply, as to the impropriety of any attempt to use this clause for an indirect object. Having thus referred to what I regard as the true construction of sec. 96, I will now proceed to the consideration of what are the facts with which we have to deal. It appears that in 1887 the insolvent, who had been carrying on business in the Northern Territory, and at Derby in the northern part of Western Australia, and had, I suppose, a branch business in Melbourne, was in difficulties, and was being pressed by the Town and Country Bank for a debt of £23,000, for which they held very inadequate securities. These have recently been valued at some £7,000, some time ago they were valued at £13,000, and in all probability at the time this debt was incurred the insolvent stated they were worth a much larger amount. The insolvent being pressed for payment by the bank proceeded to Derby, and there affected to make a transfer of the Derby business to a Mr. Le Bas, his wife, and his son; and of the Northern Territory business to his son and Le Bas, who he stated was the trustee for his wife. The terms of the transfer to the new firm being that the new firms, or one of them, should take over the assets of both businesses, and that the new firms, or one of them, were to discharge the debts of these businesses, with the notable and significant exception of the debt due to the Town and Country Bank. After a struggle that lasted a good many months—more than twelve, I believe—between the Town and Country Bank and the insolvent, and after a great deal of litigation resulting, I think, in two or three appeals, they succeeded in obtaining an adverse adjudication against the insolvent. He then came to Adelaide, obtained bail, and returned to Melbourne, and subsequently came over again to Adelaide for the purpose of passing his final examination. On his return journey he brought with him a number of books and documents. A large number of the other books and documents relating to the transactions which I have shortly sketched out were placed in the custody of a solicitor, who was contemplating a family alliance with the insolvent, and although a great deal of pressure has been brought to bear in the course of the insolvency proceedings, and although some of the books and documents have been obtained, the insolvent and those acting with him have refused to produce a large number of these books before the Court of Insolvency. Looking at the facts I have shortly sketched out, I think it is taking a very moderate and deliberate view to say that this, unexplained, creates a vehement suspicion, and the creation of these new firms, and the transfer of the assets to them, suggest that they were all part of a

scheme to deprive the Town and Country Bank of any share in the assets of the firm to which they gave credit, and of which the insolvent was the principal and managing partner, and that these deeds have been fabricated with the view of carrying out that scheme, and that the books, papers, and documents which the insolvent has left in Melbourne under the pretext that they belonged to these so-called new firms are really books, papers, and documents under his own control, and belonging to him, and which he is reluctant to produce on account of the light they may throw on his transactions. If no further explanation can be given than that already produced in evidence, I think that any tribunal calmly reviewing these facts could not come to any other conclusion than that they at least showed a fraudulent intention on the part of the insolvent to prevent his assets becoming available for the benefit of at least one of his creditors, and to prevent the Court of Insolvency from investigating the real nature of the transactions to which I have referred. Under these circumstances I cannot but regard the refusal of the insolvent to produce these books as contumacious and obstinate, and that he has shown a persistent refusal to conform to the law of insolvency. I share the suspicion evidently held by the learned Commissioner in the Court below. I think he acted quite within his jurisdiction, and I support the intention of the Insolvent Act as well as its letter in refusing the application of the insolvent for any further protection until he has produced these books, or given some more satisfactory explanation for their non-production.

BOUCAUT, J.

BOUCAUT, J.—I concur with what my learned colleague has said. There is only one observation I would like to make, and that is in reference to the point Mr. Nesbit has addressed himself to, namely, in regard to a decision adverse to him. He says the effect would be to imprison the insolvent from three or four to eighteen months. I venture to think that that view is entirely wrong, for if the insolvent produces his books he can get out of gaol in a week. If he proves, on the other hand, that he cannot produce them because they were bona fide in the hands of Mrs. Adcock and his son, he can get out in a week. At present there is a grave suspicion that the new partnership was a sham. If it was not the insolvent can easily prove his bona fides in the matter.

Appeal dismissed; costs of the trustee to come out of the estate.

FULL COURT
BOUCAUT and BUNDEY, JJ.

1889
May 14.

In the Supreme Court.—In Banco.

IN THE MATTER OF THE DEED OF ASSIGNMENT OF RICHARD CARRUTHERS, AND IN THE MATTER OF AN APPLICATION FOR THE APPOINTMENT OF A NEW TRUSTEE.

The Insolvent Act 1886—*Special case under clause* 37 *stated before decision of Court below—Jurisdiction of Supreme Court.*

A Local Court of Insolvency must give a decision before remitting a question of law by way of special case to the Supreme Court, otherwise the special case will not be entertained.

THIS was a special case stated by the Local Court of Insolvency, Gladstone.

Fleming for Mrs. Callary, wife of the deceased trustee of the assigned estate of Richard Carruthers—I ask that the Official Assignee may be appointed trustee of the estate. Mr. Callary, the trustee under the deed of assignment, is dead, and leaves all his property to his wife. My learned friend, Mr. Limbert, applied to the Local Court of Insolvency, Gladstone, to appoint the Official Receiver of that Court as new trustee. My client does not wish to act, and I apply to have the Official Receiver appointed a trustee in order that the estate may be administered.

Per Curiam—Time after time this Court has refused to decide cases before the Court below has given us the benefit of a decision. We do not think that the peculiar wording of clause 37 of the Insolvent Act 1886 enables us to overrule precedent, and if we do as we are asked to do, encouragement will be given to a Magistrate who has any doubt as to the decision he ought to give in a case to remit the matters to this Court, and there may be no decisions in the lower Courts. We must decline to hear this case.

Order that this case be remitted to the Local Court of Insolvency, Gladstone, for decision.

In the Supreme Court.—In Banco.

FULL COURT
WAY, C.J., and BOUCAUT and BUNDEY, JJ.

COBB *v.* DUNN & CO.

1889
May 22.

Charter Party—Bill of Lading—Freight—Lighterage—Delivery—Custom—Usage.

A delivery of cargo by a sea-going vessel at Cleveland Bay into lighters is a sufficient delivery, as customary, at the port of Townsville, in Queensland.

THIS was a rule for a new trial or a verdict for the defendants on the following grounds:—

1. That there was no evidence that the freight sued for was due or payable by the defendants.
2. That there was evidence uncontradicted that all freight due was paid to the ship's agent, and that lighterage was paid by them on the ship's account with the master's concurrence, and therefore the plaintiff cannot recover back from the defendants lighterage so paid.
3. That the ship and the plaintiff, as her owner, were liable for the said lighterage, and the defendants and their agents were, and are, entitled to deduct or set off the same against the said freight.
4. That upon the true construction of the charter party, or of the charter party and bill of lading, the ship and her owner should pay the lighterage, and that there was uncontradicted evidence that such was the intention of the parties, and that a usage of the port of Townsville was proved that the ship and her owner should pay.
5. That there was no evidence of a right and true delivery of the cargo as customary at Townsville within the meaning of the charter party or charter party and bill of lading, and that any expense, including lighterage, of getting the cargo to Townsville must be borne by the ship and her owner, and in any case the plaintiff did not show it to be necessary to lighter the whole 250 tons, nor was any order of or by the charters shown to deliver into lighters, nor was there any evidence of an acquiescence or acceptance by them of such delivery in lieu of that to which they were entitled under the charter party or the charter party and bill of lading.

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6. That there was no evidence of any custom to take delivery into lighters outside the bar.
7. That the usage proved was reasonable.
8. That the contract under charter party and bill of lading was not to deliver at Townsville or as near thereto as she could safely get.
9. That the ship did not deliver at the port of Townsville, as customary when she delivered into lighters.

J. H. Symon, Q.C., for the appellants, the defendants.

Nesbit for the respondent, the plaintiff.

J. H. Symon, Q.C.—The respondent purchased the claim against Dunn & Co. from the Official Assignee when the respondent had passed through the Insolvency Court. The contract was entered into in 1883. According to the charter party the owner of the ship was obliged to land the cargo at Townsville and not discharge it into lighters. If the charter party had contained the words "to Townsville or as near thereto as she can safely get," I should not have been arguing the case to-day, as Messrs. Dunn & Co. would have had to take delivery outside the bar. He quoted the cases of *Dahl* v. *Nelson Donkin & Co.* (L.R. 6 App. Cases 38), *Hayton* v. *Irwin* (L.R. 5 C.P.D. 130), and *Neilson* v. *Wait* (L.R. 14 Q.B.D. 521). In the last case quoted, Baron Pollock said, there were three questions, namely, What was the contract between the parties as created by the charter party and bill of lading? and to what extent was that contract controlled by custom? and lastly, whether the custom is reasonable and how far in accordance with the law of mercantile usage the contract and custom could be reconciled? Here the charter party clearly provides that the ship was to enter the harbor, crossing the bar, and the custom of the port is that the ship was to bear the cost of lighterage. He also quoted McLachlan on Shipping, 384.

Nesbit—In the first place this was not substantially an action for money alleged to be due for lighterage, the form of the action being to recover balance of freight. When the vessel arrived at Cleveland Bay she was met by Messrs. Aplin, Brown & Co., the agents of Messrs. Dunn & Co., and they took the matter into their own hands, and discharged the cargo into lighters. Since then they have attempted to relieve their principals of the cost of lighterage and charged them to the owner of the ship. Not being able to cross the bar the ship discharged the cargo in the customary manner at Townsville, but it is not the custom for ships to be charged with the

lighterage. A reasonable translation of the charter is just as if the words " as near thereto as she can safely get " were contained in the charter party, because if she could not get safely in she could not safely lie and discharge into any vessel, or any wharf, dock, or pier. He quoted the cases of *Shield* v. *Wilkins* (19 L.J. N.S. Exch. 238) and *Postlethwaite* v. *Freeland* (L.R. 5 App. Cases 599). The owner of the ship had the option of refusing to unload at any wharf where the vessel could not safely lie, and accordingly she discharged into lighters at a place where she could safely lie.

[WAY, C.J.—The owner of the Manoora was to proceed to Townsville and discharge her cargo, as was customary. If the point at which she did discharge was the customary point, then the owner fulfilled the charter party.]

Nesbit—The other side do not say that my client has not discharged as was customary, but that it is the custom of the port for the ship to pay the lighterage.

[BOUCAUT, J.—Townsville, according to the chart put in, is on Cleveland Bay, just as Glenelg is on Holdfast Bay.]

Symon, Q.C.—The chart was not put in with the idea of showing where Townsville is, but to show where Cleveland Bay and Magnetic Island are. This point has never arisen before.

[WAY, C.J.—If the cargo had not been discharged at the proper place Messrs. Dunn & Co.'s agents should have refused delivery.]

Nesbit—The cargo was discharged at the customary place, and the other side have not for one moment, till Mr. Symon entered the case, said it was not so.

[WAY, C.J.—The agents elected to take the cargo into the lighters, but the Court would go into the contract on the question of payment.]

Nesbit—In the case of *Hunter* v. *Northern Marine Insurance Company* (L.R. 13 App. Cases 717) the judges held that a port might be an open roadstead, where vessels might load, unload, or lighter.

Symon, Q.C.—We contend that there is no comparison between Glenelg and Townsville. Arguing on the lines set out by Mr. Nesbit, one might just as well say that Port Adelaide was in Largs Bay.

[BUNDEY, J.—Port Adelaide is at the head of a navigable river, entitling it to the name of port.]

Symon, Q.C.—So is Townsville.

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[BOUCAUT, J.—But the river is not navigable.

BUNDEY, J.—The Court has to consider the nature of the port and decide the case on that. From the chart I would never believe that any sea-going vessel would attempt to enter Ross's Creek.]

Symon, Q.C.—I venture to dissent from the first proposition laid down by your Honor. Larger vessels than the Manoora, according to the evidence, have discharged part of their cargoes at the Townsville wharves. All the witnesses have spoken of Townsville as a port.

[BOUCAUT, J.—What do they mean by "a port"?]

Symon, Q.C.—They meant Townsville itself.

[WAY, C.J.—Mr. Symon will have to show that there was a request made by the master of the ship to have the cargo lightered.]

Symon, Q.C.—Your Honors are assuming a construction of the charter party which I think is not well founded. It may or may not be competent for consignees to take delivery of the goods at some intermediate port, but the master of the ship is under no obligation to deliver at any port except where he is bound for.

[WAY, C.J.—The ship delivered the cargo, and Mr. Symon has to show a contract by which the owners of the ship agreed to pay for lighterage.]

Symon, Q.C.—If I show an obligation to deliver at Townsville—that is inside the bar—then the onus is upon the other side to show that my clients elected to take delivery at some other place.

[BUNDEY, J.—Prima facie you are liable.]

Symon, Q.C.—Once you get us to the place where we are bound to take delivery the expense of landing falls on us. The obligation under the charter party was to go to what is popularly known as Townsville, and what the parties agreed on was Townsville. In the Court below it was conceded that the harbor inside the bar was Townsville.

[BUNDEY, J.—When is the vessel inside the port—when she is over the bar?]

Symon, Q.C.—I take it the vessel was only in the port when she crossed the bar, but this point was never raised in the Local Court. The whole question is, where was the vessel bound to deliver? Was it outside or over the bar? The evidence shows that the port of Townsville is one thing and Cleveland Bay another. The Court is really trying the case on the Admiralty chart. One of the witnesses said that when a vessel was chartered for Cleveland Bay the consignees paid the lighterage, but when chartered for Townsville

she has to go alongside the wharf. This distinction is always made between Townsville and Cleveland Bay. The other side must show that my clients discharged the obligation cast upon the plaintiff to pay the lighterage by taking the cargo elsewhere than its destination and consenting to pay the lighterage. Under the charter party the ship was liable for the lighterage; the plaintiff has no right to recover unless he shows that there was a right and true delivery at Townsville, which was distinct from Cleveland Bay.

WAY C.J.

WAY, C.J.—In this case the action was for freight. Under the charter party the plaintiff undertook to deliver 400 tons of flour. The ship was to touch at Townsville, in Northern Queensland, and discharge 250 tons there, the balance to be delivered at Rockhampton. As to the 250 tons, which are the subject of this action, the plaintiff has made out a prima facie case. He showed that the ship came to anchor somewhere off the town of Townsville, and defendant's agents took delivery of the 250 tons. That being so, a prima facie case for the recovery of the freight is made out by the plaintiff, and the onus lies upon the defendant of showing in some way or other that he is discharged from paying. The defendant endeavors to discharge himself from payment in two ways. First, he says that the plaintiff did not carry out his contract for delivery and that he was put to expense in getting the goods delivered; and secondly, he pleads a set-off for lighterage of goods at the plaintiff's request. The plea of the set-off may be dismissed in a word. No request is shown by the plaintiff to the defendant to do any lighterage, and that to my mind is a sure answer to the plea of set-off. Secondly, it is said that the plaintiff failed to carry out his contract because he did not deliver the 250 tons in question at Townsville, but he delivered it at a place called Cleveland Bay. It appears to me that there is evidence on which a jury would be justified in finding that both parties agreed to accept the place at which the 250 tons of flour were delivered as the destination provided for by the charter party. If that were not so I think the onus undoubtedly lies on the defendants to show that the place at which the flour was delivered was not the port of Townsville. It appears that Townsville is practically an open roadstead. The water is exceedingly shallow. We heard of a bar, but upon looking at the plan it is a continuous sandbank extending along the coast for several miles. Ships of any considerable draught cannot possibly get up to the township, although there appears to be a jetty, and I believe a wharf, alongside the creek running through the township. Ordinarily speaking, ships

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WAY, C.J.

discharge in the bay about three miles away from the township, or under the lee of Magnetic Island, which is some six miles off. Now, I think that the onus rests upon the defendants to show that this place, which was accepted by their agents as the place of delivery, is not actually within the port of Townsville, and is not understood, so far as sea-going vessels are concerned, as part of that port. It is not necessary for me to say I have come to the conclusion that it is part of the port, but it appears to me that to come to the conclusion that the plaintiff is not entitled to recover freight would be obviously opposed to the intention of the parties under the contract. The intention of the parties to this contract was that the owner should deliver the flour, at the charterer's option, either at the wharf or into lighters. The case for the plaintiff is that it is impossible to deliver either alongside the wharf or into lighters within the port of Townsville. That being the case the plaintiff was entrapped to enter into a contract under which he could not possibly receive the freight, which was stipulated for under the contract. I do not think from what I know of the defendant firm that they are capable of conduct of that kind, and therefore I have the greater satisfaction in upholding the judgment which was come to in the Court below. I have only one other observation to make, and that is with reference to the alleged custom that when ships discharge out in the bay, and not alongside the wharf, the owners should pay lighterage. If there be such a custom as that, it is opposed to the actual terms of the contract, under which the lighterage was at the charterer's expense. I do not think any such custom has been proved. If it were it would be opposed to the contract, and the plaintiff would not be bound by it. Under these circumstances I have come to the conclusion that the defendants have failed to show that there was any breach of the original charter party on the plaintiff's behalf, or that there was any request by him to do the lighterage at his expense, and that the judgment of the Court below ought not to be disturbed.

BOUCAUT, J. BOUCAUT, J.—I do not know that I should have added anything to what my learned colleague has said, but I think that his judgment leaves it open as to whether or not this port of Townsville may not be a port much the same as Port Adelaide, which is a port some miles inland. If Townsville were a port in the same way as Port Adelaide, some miles inland, that should have been shown by the defendants on the pleadings, but it seems to me that there is nothing in the evidence which shows that the ports are the same. Now,

Townsville is not in the same way a port as Port Adelaide, upon an arm of the sea, but is actually in the sea, in much the same way as Glenelg is. The charter party uses the word "Townsville," and if a charter party used the word "Glenelg" it would not suggest to my mind that the vessel must go right on to the sand or must go up that very elaborate creek which is called the Patawalonga. If a ship is off Glenelg, ordinarily speaking, I should be disposed to say that it had arrived at Glenelg. I have always seen that the papers rightly stated that when the P. & O. boats anchor one and a half or two miles off Glenelg they arrive at Glenelg. When a charter party says a vessel shall proceed direct to Townsville—not to the port of Townsville—and discharge its cargo, "as is customary," into any vessel or at a wharf where the ship can safely lie as ordered by the charterers, even if the charterers order a ship to deliver at a wharf, I do not think she is bound to deliver at a wharf if she cannot get there, and she is not bound to go to the port of Townsville, where there is only 6 or 8 feet of water if she draws 12 feet, and the charterer cannot compel any vessel to go into a port where there is not sufficient water for her. It seems to me from the evidence that the cargo was delivered, so far as I can gather, at the request of the charterers, and they accepted it. There is nothing to induce me to override the judgment of the learned Special Magistrate, but on the contrary so far as I can gather the facts confirm the judgment. The plaintiff's claim is for freight, and he has earned his money, as the defendant got the flour the plaintiff was to deliver. Therefore I can do nothing but concur with my colleague, the learned Chief Justice.

BUNDEY, J.—This is an exceedingly interesting as well as important case, and as opened by Mr. Symon, I must say that he led me away, because had his contention been correct, and had the circumstances been such as I drew from his remarks, it would have raised the question of whether delivery at the Semaphore would have been delivery at Port Adelaide. On looking at the evidence, however, and at the chart, and inspecting the so-called creek that runs out from Cleveland Bay up to Townsville, I find that it does not go into the centre of Townsville, but that it goes on one side of it. I see it is called Ross's Creek, and it runs 3 feet, 4 feet, and 5 feet in depth right through, and in one hole 10 feet and in another 12 feet; and to call that a navigable stream analagous to the Port River, which it is now alleged is dredged 200 feet across from a depth of from 24 to 26 feet at low water, is slightly erroneous. Townsville is a port very much more

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like Port Wakefield or Port Broughton than like Port Adelaide. According to the chart Cleveland Bay is open only to the north, and Magnetic Island is sheltered on every point of the compass except the north-west, and the evidence shows that, when the wind comes from any point, vessels can discharge more safely under the lee of Magnetic Island. Now under this charter party the words that guide me in this judgment are, "the cargo shall be discharged as is cus- "tomary at the port of discharge, and the cargo be brought to or "taken from the ship's tackle as customary at the charterer's risk and "expense." The evidence satisfies me that this vessel being an oversea-going ship drawing between 14 and 15 feet was unable to get into the creek. It is true that it is stated that larger vessels have gone into it, but not a word is said as to whether they were empty or not, and they must have been empty. It has been shown that it is customary for oversea-going vessels to discharge in Cleveland Bay, and in this case the charterer's agents came alongside with lighters and took the cargo. If the captain had refused and said "I refuse to deliver," the defendants would have been able to have claimed damages for non-delivery. The obligations of the charterer are clearly laid down in the case to which Mr. Nesbit called our attention. Applying the same reasoning to this case, I think it has been proved that this charter party has been carried out according to the custom of the port, and under these circumstances I think the decision of the magistrate was right.

Rule discharged with costs.

In the Supreme Court.—In Banco.

FULL COURT
WAY, C.J., and BOUCAUT and BUNDEY, JJ.

1889
May 28.

IN THE MATTER OF AN APPEAL OF THE FEDERAL BANK OF AUSTRALIA LIMITED FROM THE ASSESSMENT OF THE COMMISSIONER OF STAMPS.

Stamp Act 1886, *section* 30—*Bank—Deposit Receipt and Voucher—Promissory Note—Language of Acts Act* 1872.

A fixed deposit receipt, and a deposit receipt at call, in the following words and figures were granted by the Federal Bank of Australia Limited to Wm. Longbottom:

Fixed Deposit Receipt.

No. 999. Due 31st August, 1889.

The Federal Bank of Australia Limited.

(Royal Arms.)

£100. Adelaide, 31st August, 1888.

(L.S.) Received from Wm. Longbottom the sum of one hundred pounds stg. to be placed to his credit for twelve months fixed on deposit account with this bank bearing interest during that period at the rate of 5 per cent. per annum and in the terms detailed by the depositor in his paid in voucher of this date.

For the Federal Bank of Australia Limited,

Entered—Henry D. Cook, Accountant. William Neil, Manager.

This receipt must be produced when the money is called for.

[Not transferable.]

Deposit Receipt at Call.

No. 250.

The Federal Bank of Australia Limited.

(Royal Arms.)

£100. Adelaide, 31st August, 1888.

(L.S.) Received from Wm. Longbottom the sum of one hundred pounds stg. to be placed to his credit on deposit receipt with this bank on terms agreed on by him as detailed in his paid in voucher to this bank of this date.

For the Federal Bank of Australia Limited,

Entered—Henry D. Cook, Accountant. William Neil, Manager.

This receipt must be produced when the money is called for.

[Not transferable.]

The above receipts, together with certain vouchers set out in the special case below, formed the whole agreement between the parties.

Held, that these receipts are not promissory notes within the meaning of clause 30 of the Stamp Act 1886, and therefore not chargeable with stamp duty.

Held also, that the words "document or writing" in that clause cannot be construed by virtue of the Language of Acts Act 1872 to mean "documents or writings," as such construction would be inconsistent with the context or subject matter of the clause.

THIS was a case stated by the Commissioner of Stamps in pursuance of section 20 of the Stamp Act 1886.

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Sir J. W. Downer, Q.C., J. B. Muirhead, and *Cavenagh* for the Federal Bank of Australia Limited.

The *Hon. C. Mann, Q.C., C.S.,* for the Commissioner of Stamps.

The case stated was as follows:—

Case stated and signed on the twenty-second day of October, one thousand eight hundred and eighty-eight, by the Commissioner of Stamps, pursuant to section 20 of the Stamp Act 1886.

1. The Federal Bank of Australia Limited carries on business as a bank in the province of South Australia.
2. On the 31st day of August, 1888, the said bank received from one William Longbottom two several sums of one hundred pounds, one as a fixed deposit and the other at call. Upon depositing the said sums with the said bank William Longbottom signed "paid in vouchers" in the words and figures following:

Fixed Deposit, No. 999.

Adelaide, 188

Paid into Federal Bank of Australia Limited the sum of as a fixed deposit for months, repayable with interest at the rate of per centum per annum, on the next ensuing, on returning to the bank the Receipt No. now handed to me, and I agree that the possession of the said Receipt by the bank shall be conclusive evidence of my having, or of some person on my behalf having, received the amount now deposited.

£ : :

Paid-in Voucher for
Deposit at call.

Adelaide, 188

Paid into the Federal Bank of Australia Limited the sum of for which I have received a Deposit Receipt, No. 250, and I agree that in consideration of the bank taking charge of the amount, it shall not be withdrawn except on giving up the receipt, and that the possession of the same by the bank shall be conclusive evidence of my having, or some person on my behalf having, received the amount stated therein.

£ : : sterling.

And the said bank issued to the said William Longbottom two several receipts in the words and figures following:

Fixed Deposit Receipt.

No. 999. Due 31st August, 1889.

The Federal Bank of Australia Limited.

(Royal Arms.)

£100. Adelaide, 31st August, 1888.

Received from Wm. Longbottom the sum of one hundred pounds stg.

L S. to be placed to his credit for months fixed on deposit account with this bank bearing interest during that period at the rate of 5 per cent. per annum and in the terms detailed by the depositor in his paid in voucher of this date.

For the Federal Bank of Australia Limited,
Signed,

Entered—Henry D. Cook, Accountant. William Neil, Manager.
Signed

This receipt must be produced when the money is called for.
[Not transferable.]

Deposit Receipt at Call.

No. 250.

The Federal Bank of Australia Limited.
(Royal Arms.)

£100. Adelaide, 31st August, 1888.

L.S. Received from Wm. Longbottom the sum of one hundred pounds stg. to be placed to his credit on deposit receipt with this bank on terms agreed on by him as detailed in his paid in voucher to this bank of this date.

For the Federal Bank of Australia Limited,
Signed,

Entered—Henry D. Cook, Accountant. William Neil, Manager.
Signed

This receipt must be produced when the money is called for.
[Not transferable.]

3. On the said 31st of August, 1888, the said bank required the Commissioner of Stamps under section 19 of the Stamp Act 1886 to express his opinion as to whether the said deposit receipts or either of them were chargeable with any, and if any, what amount of duty under the Stamp Act 1886.
4. On the 4th day of September, 1888, the Commissioner of Stamps expressed his opinion that the said deposit receipts were both chargeable with stamp duty, and assessed the same at one shilling.
5. The said bank have paid duty in conformity with the said assessment, and on the 6th day of September, 1888, gave notice to the Commissioner of Stamps that the said bank was dissatisfied with the said opinion and assessment of the said Commissioner of Stamps on the ground that the said bank did not consider the said deposit receipts or either of them subject to stamp duties, and required the Commissioner of Stamps to state and sign this case and deliver the same to the said bank, to be sent down on the application of the said bank for hearing in this Honorable Court.

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COMMISSIONER OF STAMPS.

The questions for determination by this Honorable Court are—

1. Is the said opinion of the Commissioner of Stamps that the said deposit receipts, or either and which of them, were chargeable with stamp duty, correct?
2. Is the said assessment of the said Commissioner of Stamps erroneous, and if so with what amount of stamp duty are the said deposit receipts or either of them chargeable?

J. G. RUSSELL,
Commissioner of Stamps.

Sir J. W. Downer, Q.C.—This case is stated for the purpose of testing whether ordinary bank deposit receipts are subject to duty as promissory notes. In August last Mr. W. Longbottom deposited £100 in the Federal Bank at fixed deposit for a certain period, and another £100 payable at call. He signed "paid-in vouchers," and the bank gave him deposit receipts for the amounts. The Commissioner of Stamps held that these were promissory notes within section 30 of the Stamp Act 1886, in which the definition of a promissory note is stated to be "any document or writing except a "banknote containing or importing a promise to pay any sum of "money." This definition is the same as that given by the Imperial Act 33 and 34 Vic. c. 97 sec. 49, except that the Legislature here has added the words "or importing." I submit that, irrespective of the Stamp Act 1886, the statutory definition of a promissory note only defines what was already known to the law as a promissory note, that is a document in writing containing an absolute promise to pay, and although that is the definition, it is clear that no precise form of words is necessary if words are used which import a promise to pay. The word promise has no mystic force in creating the mercantile instrument known as the promissory note. In the statute, whatever the intention might have been, all that has been done is to give a legal definition of the term, and I ask whether these documents can be classed as such. Secondly, even supposing the words "importing "a promise to pay" carry the definition beyond the legal one, apart from the statute, still the instrument contemplated here must be an instrument on which action could be maintained without reverting to the original consideration. Then it is perfectly clear that the promissory note has to be a complete document in itself, containing an unconditional promise to pay. The documents which are sought to be taxed are simply receipts for money to be placed to the credit of

the depositor on terms agreed to by him as detailed in the paid in voucher. As far as I can see there never has been any serious contest on the question that deposit receipts are not promissory notes. They are in fact less promissory notes than some other forms I have seen, as they are simply an acknowledgment that the bank had received money on some terms which were not mentioned.

[BUNDEY, J.—You might sue on a deposit receipt and any document therein referred to.]

Sir J. W. Downer, Q.C.—You would not be suing on a promissory note.

[BUNDEY, J.—Certainly not.]

Sir J. W. Downer, Q.C.—A deposit receipt is not a negotiable instrument. A promissory note must be something which the parties intend to be one. *Tolbert* v. *Cody* (10 Irish Equity Reports at p. 144), *Moore* v. *Ulster Bank* (11 Irish Reports Common Law 516), *Sibree* v. *Trip* (15 L.J. N.S. Exchequer 319), *Yeo* v. *Dawe* (53 L.T. N.S. 125), *Hyne* v. *Dewdney* (21 L.J. Q.B. 278), *Horn* v. *Redfern* (4 Bingham, New Cases, 433). At the time the decision was given in the last of these cases the Imperial Stamp Act in force was No. 55 of George III. c. 184, which contained a provision under the head of "promissory "notes" that all receipts for money deposited with any bank, or in the hands of any bank, which were for amounts at interest were to be treated as promissory notes. This provision was omitted from subsequent Acts, and no doubt the Imperial Legislature saw a good reason for so omitting it. Appropriate instances of instruments held not to be promissory notes are contained in the cases of *White* v. *North* (18 L.J. N.S. Ex. 316), *Melnotte* v. *Teasdale* (13 M. & W. 216). The imposition of stamp duty on deposit receipts in South Australia has led to about half a million of money being taken to Victoria for deposit.

[BOUCAUT, J.—We don't want to hear anything about that. It has nothing to do with us.]

Sir J. W. Downer, Q.C.—I merely mention this to show a reason for the amendment of the English Act. Seeing that our Act was framed on the English Act I think I may fairly refer to the history of the legislation for the purpose of finding what the intention was.

The *Hon. C. Mann, Q.C.*—The Stamp Act as a revenue statute must be construed strictly against the taxpayer.

[WAY, C.J.—We do not think so.]

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The *Hon. C. Mann, Q.C.*—I submit that the settlement of the question involved in this case depends on the construction placed upon section 30 of the Stamp Act 1886. That section has a further definition of what is to be deemed "a promissory note." That definition is as follows:—"Any note promising the payment of any sum "of money out of any particular fund which may or may not be "available, or upon any condition or contingency which may or may "not be performed or happen." This also appears in the Imperial Act. It is clear that our Legislature had not in contemplation the document known for ages as a promissory note when they inserted the definition in the Stamp Act 1886, and that it was intended to extend the meaning of "promissory note" very considerably beyond the ordinary acceptation of the term. There has been great division of opinion in England as to what are promissory notes. In the Supreme Court of Victoria Mr. Justice Kerford and Mr. Justice A'Beckett overruled a decision of the Chief Justice of Victoria in *Hickling* v. *Todd* (15 V.L.R. 154). In this case the principal question involved was whether a document purporting to be a bought note for the purchase of certain shares, and by which the defendant promised to pay a balance due on the purchase, was a promissory note within the meaning of the Victorian Stamp Act and required to be stamped as a promissory note. In that case the Chief Justice held that that was a promissory note and required stamping, but he was overruled. I submit that the Chief Justice was correct. A promissory note is only an agreement in writing, and I submit that it matters not whether it is contained in two or more documents provided it is an agreement to pay money and nothing else. The Legislature must be taken to have meant something by the words "or importing," which are not in the Imperial or Victorian statutes. The deposit receipt given to Mr. Longbottom imports a promise to pay him, and it bears the words, "This receipt must be produced when the money is called "for." Does not that import a promise to pay?

[BOUCAUT, J.—Not irrespective of the terms mentioned in the other document.]

The *Hon. C. Mann, Q.C.*—The mere fact of an agreement being on two pieces of paper will not alter its meaning. *Yeo* v. *Dawe* (*sup.*), *Davies* v. *Herbert* (11 V.L.R. 386), *Partington* v. *Attorney-General* (4 Eng. & Ir. App. 100). There is another aspect I would like to place before the Court. If the words on the receipt after "5 per "cent. per annum" were struck out, the receipt certainly would

import a promise to pay an amount. Even if it be necessary to refer to another document for certain conditions which for the sake of convenience were placed on another paper, I do not think this affects the legal effect. There is one agreement, and it is an agreement to pay the money, and although the word "document" is used in the section of the Stamp Act 1886 it must there mean agreement. The mere fact of an agreement being contained in two pieces of paper does not make it invalid. When the last document was executed the agreement was complete, and the last document ought to be stamped.

[WAY, C.J.—Why then did not the Legislature expressly make every such "agreement" subject to duty? If they want revenue they must make the net with a sufficiently small mesh.]

The *Hon. C. Mann, Q.C.*—I submit that this case is distinguishable from *Yeo* v. *Dawe* (*sup.*) because here the agreement was to pay money and do nothing else. Mr. Justice Williams has said—"The "clause is to receive a strict and not a liberal interpretation," and that "if a person sought to be taxed comes within the letter of the "law he must be taxed."

[WAY, C.J.—That is exactly my view of a Revenue Act. We must keep strictly to the wording, as in the case of a penal statute. Maxwell on Statutes lays down that in a case of doubt the construction most beneficial to the subject must be adopted.]

The *Hon. C. Mann, Q.C.*—A promise to pay can be gathered from the agreement, and the legal effect is exactly the same as if the terms in the voucher had been incorporated in the deposit receipt. I submit that the words "document or writing" may be taken in a plural sense by virtue of the Language of Acts Act.

WAY, C.J.—Questions arising under the Stamp Act are very conveniently stated for the opinion of this Court by way of a special case, and in this particular case the question for our decision is whether two bank deposit receipts given by the Federal Bank of Australia Limited are liable to be stamped as promissory notes. These documents on the face of them are not promissory notes according to the unwritten mercantile law. This is admitted on both sides, but it has been contended on the part of the Commissioner of Stamps (who so decided) that they come within the definition of "promissory note" contained in section 30 of the Stamp Act of 1886. The principal part of that definition is that a promissory note means and includes "any document or writing "(except a bank note) containing or importing a promise to pay any

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"sum of money." Under the second branch of the definition it "means and includes any note promising the payment of any "sum of money out of any particular fund which may or may "not be available, or upon any condition or contingency which may "or may not be performed or happen." If the paid-in voucher which is set out in the case and the deposit receipt, which the Commissioner says ought to be taxed, were together one document I have little doubt—it is unnecessary finally to decide the point or to call on Sir J. W. Downer to argue it—that both these instruments being contained in one paper would together form a promissory note within the meaning of the statute. They are not contained in one document or writing, but in two, and what we have to decide is if the document or writing, that is to say the deposit receipt which the Commissioner requires to be stamped, comes within the meaning of this section. Now, on reading the document it will be seen that it does not contain in express language a promise to pay. I quite agree with the learned counsel (Mr. Mann) that if the document ended at the words "rate of interest 5 per cent. per annum," one might gather from it, or, to use the words of the section, "import" into it a promise to pay, because the presumption would be that the money which was received from the person paying it in, and to whose credit it was to be paid, and who was to be the holder of the receipt which was to be produced when the money was called for (a receipt which also has written across it the words "not transferable"), was the money of that person, and that at the expiration of the term for which the money was deposited it was to be repaid to him. But these are not the only words in the document. It goes on to say, "and in the terms detailed by the depositor in his "paid-in voucher of this date." That is to say it is an acknowledgment of the receipt of the money which is placed for a certain term to the credit of the depositor and which is to bear interest at a certain rate. And it goes on to say that the money is received "in the "terms detailed in the paid-in voucher." It is impossible on reading that document to come to the conclusion that it contains either an express promise, or has "imported" into it a promise to pay any sum of money to any particular person. The document therein referred to, until it is looked at, may be a binding undertaking that the money shall be paid to someone else or to some institution, or be remitted to England, or be used for any lawful purpose that happens to be stated in the voucher referred to in the instrument of that date.

In other words the deposit receipt is not a complete agreement; it is only part of an agreement for the rest of which we have to look at another instrument. Now the definition of a promissory note contained in the Act is "a document or writing (except a bank note) containing or importing a promise to pay any sum of money." This deposit receipt, as I have explained, contains no express promise, nor has it imported into it any promise to pay, and it does not, therefore, in my opinion, come within the language of the enactment. The learned counsel has said that we ought to read the words "any document or "writing" in the section as "any documents or writings," but under the provisions contained in the Language of Acts Act 1872, though the singular may include the plural number, there is to that rule of construction the important qualification "where the same shall not be "inconsistent with the context or subject matter." Now, the meaning of a promissory note in mercantile law and statute law always means a promise to pay, contained in one particular instrument. It appears to me that it would be altogether inconsistent with the subject matter of this enactment to read it in the manner which the learned counsel (Mr. Mann) has so ingeniously suggested. If I had any doubt on that question it would be removed by the authorities to which he has directed our attention, which clearly show that statutes which impose a burden or payment upon a subject for the benefit of the revenue shall be strictly construed. I do not think that either by the literal language of the Act or by the intention of the Legislature was it ever intended that a document of this kind should be treated as a promissory note or require to be stamped as such. Therefore I must answer the case in favor of the appellant; and the question, "Is the Commissioner of Stamps correct in his opinion?" must be replied to in the negative; and the query as to whether the assessment of the Commissioner is erroneous I must answer in the affirmative.

BOUCAUT, J.—I endorse what had been said by the Chief Justice, but I would like to add some of the words given in the judgment of Mr. Justice A'Beckett in *Hickling* v. *Todd* (*sup.*). In regard to that judgment I thoroughly agree with the exposition of the law. Mr. Justice A'Beckett gave expression to the following views, in delivering the joint judgment of Mr. Justice Kerford and himself:—"We "consider that the document contains a promise to pay a sum of "money, but we do not consider that it is therefore a promissory note "within the meaning of part V. of the Act. The words of section 51, "defining a promissory note, are large enough to include any instru-

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"ment containing such a promise; but the Courts in England and "judges of our own Court (in several cases in which an objection "similar to the present was unsuccessfully raised) have decided that "the intention of the Legislature, as evidenced by other parts of the "Act, requires some restriction to be put upon this generality of "expression. Scarcely any contract would escape taxation as a "promissory note if full effect were given to the words of section 51." I entirely concur with this exposition of the law.

BUNDEY, J.

BUNDEY, J.—I quite concur with what has been said. So far as the first subdivision of the clause is concerned I have no doubt the case does not come within it, but I had not looked over the second one until my attention was called to it. I do not think the case comes within the clause.

Question 1 of the case stated—"Is the said opinion of the Commissioner of Stamps, that the said deposit receipts, or either and which of them, were chargeable with stamp duty, correct?" answered in the negative; and question 2—"Is the assessment of the Commissioner erroneous?" answered in the affirmative.

In the Supreme Court.

WAY, C.J.

1889
May 23.
June 3.

THE BANK OF SOUTH AUSTRALIA LIMITED
v.
KINGDON.

Life Assurance Companies Act 1882—*The Policies Protection Act* 1887—*Equitable mortgage of policy of assurance—Administration.*

The provisions of the Life Assurance Companies Act 1882 and The Policies Protection Act 1887 do not deprive an equitable mortgagee of a life policy of insurance of his security.

THIS was the trial of an issue ordered to be tried by a judge between the plaintiffs and defendant as to whether the plaintiffs were equitable mortgagees of a life policy of assurance on the life of the late Abraham Kingdon, deceased, for the sum of £500 granted by the Adelaide Life Assurance and Guarantee Company, and whether the plaintiffs or the defendant were entitled to the proceeds of such policy.

The facts are sufficiently referred to and set out in the judgment.

The *Hon. C. Mann, Q.C.*, and *W. J. Belt* for the bank.

J. H. Symon, Q.C., and *B. A. Moulden* for the executor.

The *Hon. C. Mann, Q.C.* — Kingdon was a customer of the Bank of South Australia, and though living at Wolseley kept his account at the Kingston branch. Up to the beginning of 1884 the account seemed to have been a credit one, and it was not until March 22, 1884, and again on March 29, 1884, that the agent at Kingston wrote calling his attention to the fact that his account was debit one on March 31, 1884. Kingdon promised to pay off his account, but sent his deeds for safe keeping. On April 1, 1884, the manager of the bank wrote asking Kingdon whether he wanted the advance for any length of time or whether it was merely a temporary convenience. On May 22, 1884, Kingdon forwarded his deeds and the life policy. It is admitted that at first the documents were only held for safe keeping and not as security for the overdraft, which it was agreed should not exceed £500. On July 4, 1884, however, the manager pointed out that the overdraft was £873, and on July 7, 1884, Kingdon said he hoped to sell some land at Border Town and pay

WAY, C.J.
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BANK OF S.A. v. KINGDON.

the proceeds into the bank. On September 11 and October 4, 1884, the bank again complained of the increase of the overdraft, which was then £1,054, and on October 27, 1884, Kingdon wrote to the manager of the branch and stated that as the bank held the whole of his papers he hoped the manager would use his best influence to get the head office to extend the time for him.

[WAY, C.J.—That is an admission that the bank held them as security. The law of this colony is that a bank has a lien on all customers' documents, even if they are deposited for safe custody.]

The *Hon. C. Mann, Q.C.*—There is not the slightest suspicion of Kingdon's honesty and good faith, but after this his speculation did not turn out a success. In February 1888 things were so bad that he proposed to call his creditors together. He and his solicitor saw the general manager of the Bank of South Australia, and he was promised six months extension of time if he executed a legal mortgage of the property comprised in all the deeds and assigned his life policy. Kingdon agreed to do this, and to save the costs of a lawyer he was permitted to draw up the documents himself, and he promised to do so at once. The bank wrote desiring him to fulfil his promise, but he met with an accident which prevented him doing so, and he died before he had executed the mortgage or assigned the policy. We ask the Court to decide whether the bank had a claim on the money payable under the insurance policy or whether the Act affects the claim of the bank.

Symon, Q.C.—It is admitted that the bank did not give notice to the insurance company until after a claim was made for the money.

The *Hon. C. Mann, Q.C.* — The evidence and correspondence shows that the bank were equitable mortgagees of the policy on Kingdon's life for the amount of £2,000, to which extent he was overdrawn. Although not legally assigned to the bank, we submit on the facts that the bank has a prior claim to the policy to that of the widow and the other creditors. Although the Life Assurance Companies Act 1882 by section 64 provides a statutory form of assignment, the Legislature surely cannot have intended to take away the right of a man to dispose of his own property. He quoted *Evans* v. *Stevenson* (8 V.L.R. Eq. 108), *Webster* v. *British Empire Mutual Life Assurance Co.* (L.R. 15 Ch. D. 169), *Spencer* v. *Clark* (L.R. 9 Ch. D. 137), *Campbell* v. *Steven* (13 V.L R. 308).

Symon, Q.C.—We submit that the bank has to show an absolute disposition complete at law as well as in equity. There can be no

effectual mortgage created without an assignment of some sort. We contend that no equitable mortgage of the policy has been created. A distinction has been drawn throughout between what the bank call their securities, the deeds relating to the real estate and Kingdon's policy of insurance. Kingdon sent his will and life policy to the bank for safe custody along with what have been expressly called "his deeds." In any case, even if there be an assignment, it is inchoate by the absence of notice to the insurance company. *In re Russell's Policy Trusts* (L.R. 15 Eq. 26), *In re Freshfield Trusts* (40 L.T. N.S. 57). We contend that the disposition referred to in section 3 of The Policies Protection Act 1887 means a legal and complete disposition which would prevent the assured disposing of the policy again to a third party. Prior to February 8, 1888, there is nothing to show that the bank considered they had a lien on the policy.

WAY, C.J.—I have been very much assisted by the very able argument of Mr. Symon in elucidating the several very difficult points of law that have arisen in this case. I do not call upon Mr. Mann to reply, because on all the questions submitted by Mr. Symon I have come to a conclusion adverse to the interest of the executrix. The first question is whether independently of any legislation an equitable mortgage was created of the policy of life insurance either prior to the interview between the testator and the bank on the 8th of February or on that date. The original deposit of the policy was to a certain extent an ambiguous act, and it is admitted by the bank that it was not intended originally to create an equitable mortgage over the policy of insurance as well as over the deeds relating to the lands which it is admitted were intended to be charged with the overdraft. An application was made that the deeds should be deposited, and that was complied with, and it was clearly only referable to that understanding that the deeds of the land came into the possession of the bank. It being admitted that no equitable charge was at first created over the policy of insurance yet as further advances were being made it was not unnatural and it would not require very strong language to extend the charge which was created over the deeds of the real estate to the policy of life insurance which was also in the hands of the bank. Now without elaborating the correspondence I have come to the conclusion that on the 21st of December 1884 at all events the security was extended to the policy as well as to the deeds. The language used in the previous letters is undoubtedly a little ambiguous,

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and I do not stop to enquire whether the security was extended before that date, but I am quite satisfied that on that 21st of December when in replying to an application for a settlement of overdraft Kingdon applies for further advances for forbearance as to the existing debt and tells the bank that they hold the whole of his documents in their hands and when they assent to that as they do in a subsequent letter I can come to no other conclusion than that it was intended between the bank and Kingdon that their security should extend over the whole of the documents to which it could extend, and which were actually in their hands, and therefore including the policy of insurance. I am fortified in that opinion by the express declaration by Mr. Kingdon to Mr. Varley, the truthfulness of whose evidence I see no reason to doubt. But assuming that no security had been previously created, I think it was undoubtedly created at the interview on the 8th February, 1888, between Mr. Meldrum and Mr. Varley and the late Mr. Kingdon. Mr. Meldrum says in his letter—"This offer is contingent upon a satisfactory arrangement "such as I verbally indicated to you being made to Kingdon by his "other creditors for £300." I think that means that the bank did not bind themselves to wait even during the six months unless the other creditors consented to do so, and I am fortified in that by the language in the letter that "mortgages and securities be at once "executed by Kingdon." That is: the understanding was that immediately after the interview legal securities over the land and over the policy of insurance, and the security referred to over the new wheat, were at once to be completed. The bank was to wait six months, but that was conditionally on the other creditors not pressing their claims. I am therefore clearly of opinion both that the original arrangement by which the security was not to extend over the policy of insurance was extended over it, at all events by that part of the correspondence to which I have referred, and that this extension was confirmed at the interview on the 8th of February, and that a good equitable mortgage over the policy of insurance was created as between the parties themselves.

Next arises the question whether the bank is deprived of that security by legislation on the subject. I think I now understand the meaning of the Amending Act of 1887, and that I have a better idea of it now than I had previously to being assisted by Mr. Symon's argument, and also by the

comparison of the English and of the Victorian legislation on the subject to which he invited my attention. I have come to the conclusion that what was intended by the third section of that Act was that protection should be given as against creditors, either in the lifetime in the event of insolvency, or at the death of a person assured, to the extent mentioned in the fourth section. Well, then, the fourth section says—"No policy shall be protected under this "Act except to the extent of the property and interest of the "assured." Now if I enquire what was the extent of the property and interest of the assured in this particular policy of insurance, I find it was an interest in the whole amount of the insurance, subject to the equitable mortgage given by the assured to the bank. I do not think that the language to which Mr. Symon referred me in the third section "subject to any disposition during his life" expresses the measure of the protection at all. I think the measure of the protection is to be found in the language of the fourth section to which I have directed attention.

That being the case, we have next to enquire whether the language of the principal Act No. 277 of 1882, from section 64 to the end of the Act, affects equitable mortgages made without writing, because that is all I have to decide in the present case. Now I have come to the conclusion that what is set out there is not intended to regulate matters of contract between holders of policies of life insurance and their creditors, is certainly not intended to affect equitable mortgages created without writing as this one was, but to secure in the interests of insurance companies that assignments of policies may be made in a simple form, and that a legal assignment of any such policies should have no effect until notice is received and registered by the company. I think that those sections really correspond to some of the provisions in the Real Property Act, and require an extension of the same principles to them as are applied to that Act; and on the decisions in the first place of this Court, and secondly on the enactment of the Legislature, those provisions in the Real Property Act, which were at least as strong as the provisions of this Act, do not exclude the creation of equitable mortgages on deposit.

On those grounds I have come to the conclusion that as between the testator and the bank an equitable mortgage was created; that the bank is not deprived of that by the protecting sections of the Amending Act of 1887; and that the provisions of the

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principal Act as to the form and the registration of the assignment do not deprive the equitable mortgagee in this case of his security. There will be a declaration accordingly. Judgment on the issue for the plaintiffs in the terms of the order of the 5th of December last. Both parties to be entitled to costs of this proceeding out of the proceeds of the policy, the plaintiffs to be recouped such costs out of the general estate, if any.

In the Supreme Court.—In Banco.

FULL COURT
BOUCAUT and BUNDEY, JJ.

HARROLD *v.* SNOWSILL.

1889
June 4.

Married Women's Property Act 1883-4—*Action for debt—Separate Estate—Liability of married woman.*

In an action for debt against a married woman the plaintiff must prove that at the time the debt was contracted the defendant had separate property. This not being proved in this action,

Held, that the plaintiff must be nonsuited.

THIS was a special case stated by the Local Court of Mount Gambier.

The plaintiff sued the defendant, a married woman, for the sum of £5 19s. 8d., balance of rent of a cottage; £1 8s., for four weeks' rent in lieu of notice to quit; and £1 10s., for cleaning and repairs to the premises. The defendant pleaded a common appearance and a set off, and subsequently, by leave of the Court, amended the appearance by adding the following words:—"The defendant at the "time of entering into the alleged agreement for rent of the pre- "mises was and still is the wife of one Isaac Snowsill." At the hearing it was proved that the defendant at the time the alleged debt was contracted, and also at the time of action, was a married woman, and there was no evidence that she was possessed of separate property at either of such times, or that she was deserted by her husband. Upon these grounds the defendant's counsel applied for a nonsuit, and Mr. J. P. Stow, S.M., who tried the case, having reserved judgment and referred to words in clause 14, Act 300, 1883-4, providing that no husband shall be liable for debts contracted by his wife on the ground of "implied agency," which words are not in the Imperial Act, stated his opinion that it was not the intention of the local Act to deprive the creditor of all remedy in cases such as that tried on January 21, 1889. He then gave judgment for the plaintiff for £7 7s. 8d., subject to the following points which were reserved for the opinion of the Supreme Court:—

1. Was it necessary to entitle the plaintiff to judgment that he should prove that the defendant had separate property at the time the alleged debt was contracted?
2. Was it necessary to entitle the plaintiff to judgment that he should prove that the defendant had separate property at the time of action brought?

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Nesbitt for the defendant—It is necessary for the plaintiff to prove, before he can recover, that the defendant (Mrs. Isaac Snowball) had separate estate of her own. At the trial no evidence was given to show that she had any separate estate. She is living with her husband and has no separate estate.

BOYD, J.

BOYD, J.—This action is brought against a married woman to make her liable under the Married Women's Property Act for a debt. It appears that at the time she entered into the contract in respect of which she was sued she had no separate estate, and one of the questions for the decision of this Court is, "Was it necessary to "entitle the plaintiff to judgment that he should prove that she had "separate property at the time the alleged debt was contracted?" Another question affecting this has been raised which this Court need not trouble about, because our answer to the first question will render it unnecessary for us to do so. Mr. Nesbitt cited two cases which show that in England a contract made by a woman which was sought to be enforced against her under a similar Act was of no force unless at the time she entered into it she had separate property. The case of *In re Shakespeare, Deakin* v. *Lakin* (L.R. 30 Ch. Div. 169), before Mr. Justice Pearson, makes this pretty clear; and afterwards the Court of Appeal in the case of *Palliser* v. *Gurney* (L.R. 19 Q.B.D. 519) agreed with Mr. Justice Pearson that it is perfectly clear that one effect of the Married Women's Property Act in England is that a married woman cannot be made liable unless she has separate property. Subsection 3 of clause 1 of the English Act pre-supposes the existence of separate property at the time of a married woman making a contract, otherwise there was no power to contract; and then it provides that her separate property shall be bound by the engagement. If that subsection were in our Act, the Court would be bound to follow the decision of Lord Justice Lindley unless there were grave reasons against doing so. If that subsection were in favor of the plaintiff, of course its absence from our Act would make things more favorable here to the married women, but when I look at it in the English Act it seems to me that our Act would be unmeaning without it. I find it very difficult to attach a meaning to our subsection 3 (which is really subsection 4 in the English Act) without subsection 3 of the English Act. I cannot understand our subsection 3—"Every contract entered into by a married woman with respect to "and to bind her separate property shall bind not only the separate "property which she is possessed of or entitled to at the date of the

"contract, but also all separate property which she may thereafter "acquire"—unless in the light of subsection 3 of the English Act. In the present case it is certain that the contract is not with respect to the defendant's separate property, and that neither in intent nor in meaning nor by any process of reasoning can anybody make it a contract with respect to her separate property. It is also clearly not a contract entered into to bind the defendant's separate property. Those who are engaged in legislation should carefully look into the Act because it may be possible to place wrong constructions on it, constructions which are not possible with the English Act, because of subsection 3, which is the foundation on which the section immediately following (our subsection 3) was built. Unless there is a declaration in the Act to the effect that a contract entered into by a married woman should be deemed to bind her separate property, there is nothing to support the words of the subsection 3 in our Act. It would not be necessary for me to say so much were it not that there might be some cases by which under the English Act a married woman might be bound, and yet by reason of the omission of the English subsection 3 from our Act she would not be bound in this colony. It is perfectly clear that our Act has not the grip of the subject that the English Act has. The learned special magistrate referred to section 14 of our Act, but I cannot see how it touches this case. The proviso mentioned by him was clearly put in for the purpose of protecting the husband against extravagant contracts entered into by the wife—a very proper thing for the Legislature to do, but certainly I cannot construe it as having that connection with section 1. Careful consideration of the law induces me to the belief that the answer to the first question must be that it is necessary for a plaintiff to prove that at the time a debt was contracted the defendant had separate property. This has not been done in the present case, and consequently the answer will be in the affirmative, and a nonsuit will have to be entered.

BOUCAUT, J.

BUNDEY, J.—I concur with the view taken by my learned colleague. I am glad the case has come under the notice of the Court, because it is one interesting to the trading community. In these days of women's rights and liabilities it is essential that people should know the limits to which they may trust them, and the present case will be likely to bring under the notice of traders the risks they run. It is not, I suppose, generally known that when a plaintiff who has supplied goods to a married woman brings an action for the recovery of the money

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Nesbit for the defendant—It is necessary for the plaintiff to prove, before he can recover, that the defendant (Mrs. Isaac Snowsill) had separate estate of her own. At the trial no evidence was given to show that she had any separate estate. She is living with her husband and has no separate estate.

BOUCAUT, J.

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BOUCAUT, J.

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due the onus is on him of showing that she is possessed of separate property at the time she entered into the contract. In England the difficulty is got over by express provision, and the matter is reduced to a practical issue. As the law stands at present in this colony it is just as well that the case has been brought before us, inasmuch as it will, as I said before, open the eyes of traders to the dangers they run.

First question answered in the affirmative, and a nonsuit ordered. Costs, £10 10s. against plaintiff.

In the Supreme Court.—In Banco.

FULL COURT
BOUCAUT and BUNDEY, JJ.

IN RE THE CITY AND SUBURBAN STEAM BRICKMAKING COMPANY LIMITED.

1889
June 4.

The Companies Act 1864—*Winding up—Petition by company for winding up of other company—Affidavit verifying petition.*

When a petition is presented by one company for the winding up of another company, the Court may give leave that the affidavit verifying the petition be made by one of the officers of the petitioning company.

MOTION by the Bank of New Zealand for an order to wind up the City and Suburban Steam Brickmaking Company Limited.

J. H. Symon, Q.C., for the Bank of New Zealand, the petitioner.

Sir John Downer, Q.C. (with him *Barlow*), for the company.

J. H. Symon, Q.C.—The company was floated with a capital of £15,000 in 15,000 shares of £1 each; £6,832 has been advanced by the bank—they value their securities at £4,000—and £2,832 is still due to them. The affidavits which I read show that the bank has made several applications for payment to the secretary of the company, who stated that the company was not in a position to pay. I therefore ask that the company may be wound up on the ground that it cannot pay its debts. It has practically ceased to carry on business.

Sir John Downer, Q.C.—The company is undoubtedly insolvent, seeing that it cannot meet its liabilities, but of course the Court under certain circumstances may say that in the interests of the shareholders it is not advisable that an order for winding up should be made. It is the duty of the company to take care that the order for the winding up is not made unless the proceedings are conducted in a proper form. I ask, first, who is the petitioner? I am told the Bank of New Zealand. Well, who is the Bank of New Zealand? The petition simply describes it as the Bank of New Zealand and nothing else. As a matter of fact there is nothing in the statutes of this colony that recognises that bank. Therefore on the face of the petition there is no allegation of a person or a body. The bank must show that it is a corporation.

[BOUCAUT, J.—No. Why should they? It is not like a question where the internal arrangements of the bank are concerned. If they are illegally trading, show it.]

Sir John Downer, Q.C.—There must be a petition and an affidavit verifying that petition, which must according to rule 4 of schedule 6 of

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the Companies Act 1864 be made by the petitioner. This goes to the very root of the application. *Vide* the *Bank of Montreal* v. *Cameron* (2 Q.B.D. 536) (Buckley 4th ed. p. 568). A corporation other than the liquidating corporation cannot petition.

J. H. Symon, Q.C.—I contend that the company is not entitled to raise this objection, seeing that the bank has obtained an *ex parte* order from his Honor Mr. Justice Boucaut to take the affidavit of the Adelaide manager of the bank as to the facts stated in the petition, which affidavit has been filed. As this *ex parte* order has been made, the affidavit cannot be objected to and the petition must stand.

Sir John Downer, Q.C.—I submit that the order was made without discretion and is subject to review.

BOUCAUT, J. BOUCAUT, J.—A preliminary objection is now made as to the affidavit verifying the petition. It seems to me that in accordance with the words of the rule the remarks made by Lord Justice Bramwell in the case cited by Sir John Downer might have some bearing on this case. I have, however, after consideration, decided to follow the opinion of Mr. Buckley in his work on companies (4th ed.) and the dictum of Vice-Chancellor Hall in *The Cakemore Causeway &c. Brickworks and Colliery Company* (28 W.R. 299), and I hold that the defect, which is apparently caused by rule 4 not specifically providing for a petition by the company, is overcome by a special order. An order for winding up will therefore be made.

BUNDEY, J. BUNDEY, J., concurred.

Order accordingly.

In the Supreme Court.—In Banco.

FULL COURT
WAY, C.J., and BOUCAUT, J.

1889
June 12.

THE DISTRICT COUNCIL OF PENOLA *v.* HOGGARTH.

The District Councils Act 1887—*Rate—Assessment—Appeal to Local Court—Special Case—Jurisdiction of Supreme Court.*

The Supreme Court has no jurisdiction to entertain a special case stated by a Local Court in respect of an appeal against an assessment of rates under The District Councils Act 1887.

THIS was a special case stated by his Worship Jefferson Pickman Stow, Esquire, Special Magistrate, Local Court, Penola.

Nesbit for the District Council of Penola.

Symon, Q.C., for Hoggarth.

Nesbit—I contend that the Local Court has no power to state this case. Under The District Councils Act 1887 appeals against assessments cannot go beyond the Local Court, and I submit that a special case is simply a mode of appeal.

Symon, Q.C.—What the magistrate has done is to send a difficult point of law for the consideration of your Honors, and I submit there is power to state a case as has been done in this instance. Any Local Court, if doubtful on a point of law, has the right to take the case to the highest Court in the country for its opinion.

Per Curiam—The Supreme Court has no power to entertain such a special case as this.

Case ordered to be returned to the Local Court with this intimation.

BOUCAUT, J.

1889
July 4, 5, 9, 10.

In the Supreme Court.

FERRY *v.* BONNIN AND OTHERS.

Injunction—Damages—Racing club—Membership—Possession of property by club — Malpractice — Suspension — Notice to accused member — Submission by accused member or other person to arbitration—Rules of club—Equity action—Nonsuit—Appearance by party as suitor and counsel.

F. was a member of the S. A. Tattersall's Club, of the committee of which the defendants were members. F. had a dispute with C. another member, concerning a bet, which dispute was referred by F. and C. to the arbitration of the committee of the S. A. Tattersall's Club, C. having intimated to F. that F. had better not go before Tattersall's as he C. would expose F. were F. to do so.

No other question but that concerning the bet was referred to arbitration, but C. made a charge of malpractice against F., upon which the committee adjudicated notwithstanding that F. refused to go into the charge, and called no evidence concerning it.

Upon the consideration of the matters in dispute between F. and C. and after hearing the evidence of both parties and other witnesses the members of the committee present found upon certain facts which such members held were admitted or proved that F. was guilty of malpractice, and after referring the matter to a fuller committee, the committee suspended F. and caused the following notice to be posted in the clubroom:—

"List of defaulters by S. A. Tattersall's:

"For malpractice—Seth Ferry, February 12, 1889."

On the trial of this action P. F. B. one of the defendants, appeared as one of the counsel for himself and the other defendants.

In the course of the proceedings an application was made for a nonsuit.

It was submitted for the defendant that as the club had not and was not alleged or proved to have any property the defendants must have judgment, and it was also contended that the plaintiff had sufficient notice of the enquiry as to malpractice, and was otherwise bound by the rules which he had signed.

Held, that no person can take the position of suitor and counsel.

That (in this case) the absence of any allegation or proof of the possession of property was not an answer to the action.

That F. had not due notice of a charge of malpractice, nor did he submit to the arbitration of the committee of S. A. Tattersall's Club, and that submission of members and non-members to such arbitration is required by the rules of the S. A. Tattersall's Club in order to give the committee jurisdiction.

That F. was entitled to the injunction and judgment as claimed, with £250 damages.

Symon, Q.C., for the plaintiff—I submit that before the committee of Tattersall's Club can find a man guilty of a serious offence under rule 15 of the club, there must be a specific charge, a specific complaint, and the attention of the accused must be directed to the matter alleged so that he may have ample opportunity of defence. The committee here were called together by Mr. Ferry to investigate a claim by him as to certain moneys alleged to be due to him by a bookmaker,

Having assembled together under rule 14 of the club to decide this claim, the committee suddenly turn themselves into a criminal court and find Mr. Ferry guilty of a serious charge. A Local Court or other tribunal having to decide a civil case might as well suddenly turn round and find the plaintiff guilty of murder.

Nesbit (with him *P. F. Bonnin*) for the defendants—This claim is demurrable. The ground of interference by the Court is the possession of property by a club. Neither in the claim nor in the evidence is there any allegation showing that in this case the club has property in which the plaintiff would have an interest should the club be dissolved. *Hopkinson* v. *Marquis of Exeter* (L.R. 5 Eq. 63), *In re St. James' Club* (2 De G. McN. & G. 383), *Lyttleton* v. *Blackburne* (45 L.J. N.S. Ch. 219). Would the Court interfere with the action of a whist club if the members said—"We will not have So and So as a member "of the club any longer"? This club is not alleged to possess any property. It is quite evident Mr. Ferry's submission was not under rule 14. The matter for arbitration was not a bet. It was a claim by a person against an agent for misfeasance. It was a mutual charge of malpractice by the plaintiff and one Carr under rule 15. What would the committee have done had they found Carr guilty? Would they not have found him guilty of malpractice? Rule 15 has an important bearing on this case. My learned friend says that before the committee can arbitrate between members the latter must submit to the jurisdiction of the club. It is a reasonable construction of the rule as to submission to hold that it only applies to non-members. There is evidence to demonstration that here there was submission to the club's arbitration within the meaning of rule 15. This submission would not need to be in writing, but would be inferred from the acts and conduct of the parties, and it would mean submission on the ground of fraud or malpractice or no fraud or malpractice. Having found Ferry guilty of malpractice what had the committee to do? Why, to post him as they did. The posting was merely the publication of the judgment.

July 9.

Nesbit—There is no evidence that the members of Tattersall's are more than privileged guests of the landlord of the Globe Hotel. This is admittedly not an action of libel, and I submit the occasion was privileged, and there is no allegation or evidence of malice. *Prudential Insurance Company* v. *Knott* (44 L.J. N.S. Ch. 192). I submit that the Court has only to determine whether the committee acted in accordance with the principles of common justice, and not

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whether they acted in accordance with strict legal practice. Carr's threat of exposure should have been sufficient notice to Ferry. When the committee acts *bona fide* without malice it is protected by rule 7, which says—"Every member must subscribe his name and "address in the members' book, containing the Rules of the Club; and "such signature will make it binding on the person signing to abide "by all such Rules, as well as by all consequences resulting from "breach or non-performance thereof; and such signature shall, more-"over, be taken and deemed to absolve every person concerned in "carrying out and performing such rules against such subscriber "from all personal responsibility, or legal liabilities, on such account." This rule was signed by Ferry, and he must abide by it. I refer the Court to the case of *Richardson-Gardner* v. *Fremantle* (24 L.T. N.S. 81), *Dawkins* v. *Antrobus* (L.R. 17 Ch. D. 615), *Lambert* v. *Addison* (46 L.T. N.S. 20). The doctrine of privilege must be extended to any action analogous to one of libel. *Filgate* v. *The Australian Jockey Club* ("Australasian," May 24, 1873). I ask for judgment for the defendants.

Symon, Q.C.—As to the last case quoted——

[BOUCAUT, J.—Address yourself first to the question of the club not possessing property.]

Symon, Q.C.—I submit there is no rule. In a case where certain persons form themselves into a club and appoint a committee and give that committee power to determine charges of misconduct, and the committee arrive at an erroneous decision or do not give proper notice to the person accused, that person is entitled to come to a Court of Equity and have the decision declared null and void, and to obtain an injunction restraining the committee from giving effect to their erroneous decision. I refer your Honor to the case of *Savill* v. *The Committee of the South Australian Jockey Club* (14 S.A.L.R. 22).

[BOUCAUT, J.—You have satisfied me on this point, Mr. Symon. I won't trouble you any further.]

Symon, Q.C.—This is a case where the decision of the committee has a direct effect on my client's business.

July 10.

BOUCAUT, J.—I have consulted my learned colleague the Chief Justice as to the position of the learned counsel Mr. Bonnin, who appeared for himself and others, and the Chief Justice has agreed with me in the view that I take, and in future I will rule that no person can take both the position of suitor and counsel. A person has no right to take both positions, and a rule had been passed on that in Eng-

land, and in future in such instances the person will have to elect to take the position of counsel or that of suitor; he cannot take both. I mention this decision for the convenience of the bar. The case is shaped on four grounds. It was brought by a member of Tattersall's Club against the committee of the club for posting him in the club-room after what they called a hearing, and the plaintiff alleged that the court or committee which decided the case did not hear the evidence; that the committee which heard the evidence did not decide the case; that there was no notice given of a hearing at which the plaintiff could attend and justify his actions; and that there was no submission under the rules of the club; and I am bound to say that all these things seemed to have been conclusively proved. First, as to the court that decided the case I find that it consisted of Messrs. P. F. Bonnin, S. J. Jacobs, H. H. Young, T. F. Wigley, and W. K. Simms. Of these only Messrs. Bonnin and Jacobs heard the evidence, and the others undertook to give judgment and post Mr. Ferry in the rooms, and that without hearing what he had to say in defence. I do not wish to comment on that, nor to say that the committee acted in a malicious manner; but I am bound to say that it is the duty of the Court to state that it is contrary to the natural law of justice for any tribunal to condemn any man without hearing him in defence or one word of the evidence. Therefore if the case stood on that ground alone Mr. Ferry would be entitled to my judgment. I do not say one word about the bona fides of the conduct of the defendants. I know most of them, and respect them highly, but they might have been mistaken as I sometimes am and overruled as I sometimes am by my colleagues; and I intend to overrule the defendants in this case. But I do say that it would have been more satisfactory if the defendants had proved what they set out in their written judgment—"That Mr. Seth Ferry "having submitted to the arbitration of the committee is found by "the committee to be guilty of malpractice"—because I cannot see any submission whatever on the part of the plaintiff. Coming back to the committee which heard the evidence, which committee consisted of Messrs. Bonnin, Jacobs, and Aldridge, it seems clear to me that there was no charge whatever against Ferry within the meaning of the rules, no charge on which any reasonable man could expect that he was going to be accused of malpractice and posted. I find there was no notice to the plaintiff, and certainly no submission on his part. Mr. Ferry had a claim against a bookmaker named Carr for a bet or a wager, I cannot exactly say which, because I know nothing at all about horse

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racing, and I confess to knowing nothing about racing rules, and I am glad that in this case it is not necessary for me to know about them; but probably it was that, knowing that, Mr. Nesbit has been induced to enter into the case at such great length. My judgment fortunately does not proceed on racing rules at all. I find that Mr. Ferry made a claim for a debt, but the bookmaker against whom he made the claim said to him—"You had better not go before Tattersall's; I will expose you if you do;" and the learned counsel for the defence gravely told me that was notice to Mr. Ferry that he would be tried by the committee of Tattersall's for malpractice. This is just as if in a civil case in the Court there was a plea setting forth some criminal information against a man to justify another in not meeting his claim, and as if, after hearing the case, the Court should pronounce the man guilty on the evidence brought forward without giving the accused an opportunity of showing why judgment should not be passed upon him in respect of the particular charge made. That course has been pursued in this case. The committee must give notice of a particular charge, and that has not been done by the committee of the club. Yet I have been told that the casual expression made in a heated moment by Carr that he would expose the plaintiff, was to be construed into a notice that an enquiry as to malpractice was to be held, the effect of which might be to post the plaintiff and possibly ruin him for life. That, in my view of the law, is contrary to what natural justice requires. I am astonished to think that the committee, two of whom were lawyers, were not more careful, and that they did not refrain from seizing hold of such an opportunity to post a man. Look at the first resolution of the committee that tried the case. That read—"That in the Simpleton case Mr. S. Ferry has no claim; and "*in re* Yule commission, that inasmuch as the claimant and his partner "in the opinion of the committee were guilty of improper conduct, "no award be made, and that the evidence be referred for the "consideration of a fuller committee as to further action." That is a clear and striking indication of what the committee thought at the moment, that was to say that Mr. Ferry was found guilty of improper conduct, and Mr. Ferry only regarded it in that light, but those words are in strong contradiction of the arguments advanced by Mr. Nesbit. Mr. Ferry claimed money from a bookmaker, and the committee believing that he had been guilty of improper conduct referred the case for the consideration of a fuller committee. I take that to mean that as the question of improper conduct had not come

before the committee they sent it on to a fuller committee to see whether anything ought to be done, and not that they had sent it on to a fuller committee to deal with the plaintiff as he has been dealt with. If the committee had decided that there was improper conduct on the part of the plaintiff they should have given him notice at the time, but they did not do so. Then what should the fuller committee have done? They could have decided to enquire into the alleged improper conduct on Mr. Ferry's part, and having sent him notice within the meaning of the rules proceeded to take evidence in the matter. In the course of his argument the learned counsel for the defence said that by rule 15 members had to submit to the arbitration of the club on any charge of default. I say that according to my reading of the rule members of the club, as well as non-members, should submit to the arbitration of the club, but they are all entitled to the same notice. Unless there be submission on the part of the person charged the club has no power to act. Then Mr. Nesbit referred to rule 7, which reads—"Every member must subscribe his name and address in the members' book, containing the "Rules of the Club; and such signature will make it binding on the "person signing to abide by all such Rules, as well as by all con-"sequences resulting from breach or non-performance thereof; and "such signature shall, moreover, be taken and deemed to absolve "every person concerned in carrying out and enforcing such rules "against such subscriber from all personal responsibility, or legal "liabilities, on such account." The learned counsel quoted that rule to show that because a member subscribed his name to the rules he must be liable to all the consequences which the committee might bring upon him. On this question Mr. Nesbit addressed a most learned and subtle argument, but in my opinion rule 7 does not give power to the committee to ignore the first principles of justice or to act in defiance of their own rule requiring submission. Rule 7 might protect the committee when they made a little slip or mistake, but not when they ignore the whole spirit of their rules and the principles which should govern proceedings of the kind in question. The case of *Dawkins* v. *Antrobus* (*sup.*), quoted by Mr. Nesbit, is very different from the one under discussion, and in that case notice was given in order that the party could show cause why he should not be dealt with. So also in *Lambert* v. *Addison* (*sup.*), although the cases were very different from this one in that the rules of the clubs concerned were framed so as to give a majority of the club for mere

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fancy's sake the right of saying that a gentleman should go out if they did not like him, and notwithstanding this notice was given to the accused. In going through the cases I found nothing calculated to set aside the principles which I have laid down. There is a very great difference between improper conduct and malpractice. The former was the excuse Carr set up for not paying Mr. Ferry, and it is quite clear that the plaintiff in going before the committee was not defending himself from a charge of malpractice, and that he did not submit himself in respect of that charge. I have my notes full of questions and answers as to what was done before the committee, and but for the fact that it had been said that sooner or later it would show that there had been submission I would not have received that evidence. I however have nothing to do with what was done before the committee, as according to their lights they may have thought that they were acting rightly. I have arrived at the conclusion that there was no submission on the part of Mr. Ferry, there was no notice to him, and at no period was he charged with malpractice, and if he had been I have no doubt from the state of the case that he could have brought more evidence forward. Having pronounced the judgment in the case of *Savill* v. *The South Australian Jockey Club* (*sup.*) I am not called upon to go into it. The only question that remains is damages, and I find some little difficulty here as there is no evidence to show mala fides. The action of the committee was a high-handed proceeding and cruel, and might have ruined the plaintiff for life. For over twenty years Mr. Ferry has carried on horse-racing without a blemish on his character, and I do not hesitate to say that it was a cruel thing to stamp him all over the world as a defaulter. It would not only injure him in racing but would injure him with other men who did not regard racing as the most strictly honorable pursuit in the world. The argument would be that if this man was posted in the racing world he must be very bad indeed. It would be idle to give nominal damages, because that would not be sufficient for the damage which he and his family have sustained. If there was no evidence of the bona fides of the committee before me I would not hesitate to give damages on a high scale. If there were evidence of mala fides I would not limit the damages to even the amount set down in the claim—£1,000. The judgment will be for the plaintiff for £250 damages.

Judgment for plaintiff in terms of claim; damages £250 with costs.

In the Supreme Court.

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HUTCHISON *v.* MATHER AND ANOTHER.

Libel—Rules of Court—Pleading—Demurrer—Application to strike out pleading—Notices in "Government Gazette"—Hansard reports of Parliamentary debates—Privileged occasion—Declaration against interest.

Notwithstanding that a pleading might formerly have been demurrable at Common Law, and now might be struck out on an application in Chambers prior to trial, under Rule 4 of Order LXIII of the Rules of the Supreme Court, or otherwise the Court will not as of course strike out such a pleading on an application made on the trial of the case.

Notices in *Goverment Gazette* and "Hansard" reports of debates in Parliament are inadmissible in evidence to prove the truth of assertions made in such notices and debates respectively.

A public writer who makes assertions with regard to individuals has not the privilege that a master has in giving a character of his servant.

A declaration or statement by a deceased selector under an agreement for the purchase of land upon credit under "The Waste Lands Alienation Act 1872" that he was the agent or trustee of another person who was alleged to have advanced and lent the moneys payable and paid under such agreement is admissible in evidence as a declaration against interest.

THIS was an action for libel by H. a sheepfarmer and landholder and a Justice of the Peace for South Australia against M. & A. who were the proprietors and publishers of a newspaper called "*The "Narracoorte Herald*" circulating in the south-eastern and other parts of South Australia.

Symon, Q.C., and *Grundy* for the plaintiff.

Nesbit and *Piper* for the defendant Mather.

The defendant Ash appeared in person.

The claim was as follows:—

1. The plaintiff is a sheepfarmer and stockholder, residing and carrying on business at Morambro and is and has been for many years a Justice of the Peace for the said province. The defendants are proprietors and publishers of "*The "Narracoorte Herald*" a paper extensively circulated throughout the South-Eastern and other parts of the said province.
2. The defendants on or about the 9th day of April, 1889, falsely and maliciously printed and published of and concerning the plaintiff and of and concerning the plaintiff as such Justice of the Peace in a leading article in the defendants' said newspaper the words following that is to say—"Here

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"and there generally in some small settlement a thoroughly "incapable J.P. may be found who makes a fool of himself "and a laughing-stock of the law whenever he mounts the "Bench Such cases arise from lack of local knowledge on "the part of the Attorney-General, who cannot be expected "to be omniscient. Darker blots on the existing system" (meaning the system upon which persons were appointed Justices of the Peace for the province of South Australia by the Government) "and ones that greatly excuse the angry "charges of corruption sometimes made are such cases as "that of Mr. W. Hutchison J.P." (the plaintiff) "who is "retained upon the roll after a specially appointed tribunal by "the Government has found him guilty of conduct which "generally has grave consequences for less favored "individuals" (meaning thereby that the plaintiff as such Justice of the Peace was worse than thoroughly incapable and worse than a Justice of the Peace who made a fool of himself and a laughing-stock of the law whenever he mounted the Bench and that plaintiff's appointment to and continuance in his said office of Justice of the Peace was a darker blot upon the said system than the appointment and continuance of a person who brought disgrace and ridicule upon the administration of justice by his incompetence and folly and meaning further that the plaintiff's appointment and continuance in office were corrupt and warranted and greatly excused angry charges of corruption in regard to the plaintiff's said appointment and continuance in office and meaning further that some specially appointed tribunal had found the plaintiff guilty of some offence or offences against the law punishable by imprisonment or fine or of conduct so disgraceful that he should have been struck off the roll of Justices of the said province and that the plaintiff had escaped punishment and has escaped being so struck off the said roll by means of corruption or undue influence as between himself and the Government or Attorney-General by whom he was and is unduly or improperly favored) And the words following that is to say "and whose" (meaning the plaintiff's) "public record is "nearly all a defiance of any law that chances to conflict with "his immediate personal interests" meaning thereby that the

plaintiff being a person charged as such Justice of the Peace with the administration of the law is notoriously and flagrantly lawless in character and that he publicly defies all laws that it does not meet his interest to observe. And in the words following that is to say "That a man" (meaning the plaintiff) "with a record so indelibly stained" (meaning thereby that the entire public record of the plaintiff's life was indelibly stained by reason of improper dishonorable and lawless conduct and conduct which in any other less favored person would have entailed grave legal punishment) "should be empowered to fine and punish "smaller offenders" (meaning that the plaintiff was a great offender of the same character and deserving of the like punishments) "is a disgrace" (meaning thereby that the plaintiff was a disgrace to the rolls of Justices and to the administration of justice in the said province and that it was disgraceful for him to fulfil the duties and office of such Justice) "and "that such a grievance exists after having been denounced "dozens of times in the metropolitan and country press is a "serious scandal" (meaning thereby that the plaintiff's continuance on the roll of Justices of the Peace and his administration of justice in that office was owing to his said conduct and offences a public grievance and a serious scandal to the general administration of justice and to the community) "but it is one that has arisen since the "appointment and one that could arise in the same way if "Justices were elected instead of being appointed." And in the words following, that is to say "the reformation" (meaning the suggested reform of the system of appointing Justices of the Peace) "would not be complete without some "means of getting rid of J.P.'s" (meaning and including the plaintiff) "who after appointment make themselves" (meaning and including the plaintiff) "conspicuously unfit "for the position" (meaning thereby that the plaintiff after his appointment had by his said conduct and offences, made himself conspicuously unfit for the position of a Justice of the Peace). "It is unfair that at present an "honest man" (meaning thereby that the plaintiff was not an honest man) "must resign because of misfortune "causing him to make an assignment while a convicted rogue"

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(meaning the plaintiff) "or acknowledged perjurer" (meaning the plaintiff) "continues to sit on the judgment seat without rebuke" (meaning thereby that the plaintiff was a convicted rogue or a rogue who had been convicted of some criminal or other offence and that the plaintiff had committed perjury and had acknowledged that he had done so and that notwithstanding these convictions and admitted offences he was permitted by the Government and the Attorney-General to continue on the roll of Justices and administer Justice without rebuke).

3. By reason of the premises the plaintiff was and is greatly injured in his credit reputation and character.

The plaintiff claims £2,000 damages.

The defence of the defendant Mather as amended was with slight and unimportant verbal differences identical with that of the defendant Ash (*infra*) except as to paragraph 3 which was as follows in the defence of the defendant Mather:—

3. In so far as the words set out in the second paragraph of the claim were published by the defendant John Baxter Mather, and in so far as the words published by him refer to the plaintiff they are fair and *bona fide* comments upon the conduct of the plaintiff in his public character as a Justice of the Peace and as a member of the District Council of Narracoorte and upon his fitness for the position of a Justice of the Peace and a member of the said District Council, which conduct and fitness of the plaintiff were matters of public interest and the said comments were published in the defendants newspaper "*The Narracoorte Herald*" *bona fide* without malice and for the public benefit and in the usual course of the business and duty of the defendant John Baxter Mather as a public journalist.

The defence of the defendant Ash as amended was as follows:—

1. He admits the allegations in the first paragraph of the plaintiff's claim.
2. He denies all the allegations in the second and third paragraphs of the claim.
3. In so far as the words set out in the second paragraph of the claim refer to the plaintiff they are fair and *bona fide* comments without malice upon the conduct of the plaintiff in his public character as a Justice of the Peace and as a

member of the District Council of Narracoorte and upon his fitness for the position of Justice of the Peace and a member of the said District Council which conduct and fitness of the plaintiff were matters of public interest and the said comments were published in the defendants' newspaper "*The Narracoorte Herald*" *bona fide* without malice and for the public benefit and in the usual course of the business and duty of the said defendant George Ash as a public journalist.

4. The plaintiff in or about the month of September 1877 induced one Neil McInnis to enter into two agreements dated respectively the 26th of September 1877 and 27th of September 1877 for the purchase by the said Neil McInnis from the Commissioner of Crown Lands and Immigration of the province of South Australia of those sections of land numbered respectively 117 121N and 146s in the hundred of Lochaber upon credit under "The Waste Lands Alienation Act 1872." At the request of the plaintiff the said agreements were entered into by the said Neil McInnis unlawfully as agent servant or trustee for the plaintiff, who paid the money payable by the said Neil McInnis under such agreements. The said Neil McInnis unlawfully at the request of the plaintiff selected the said lands as agent servant or trustee for the plaintiff the plaintiff not being a *bona fide* applicant for the said lands within the meaning of the said Act and the said Neil McInnis not being an agent employed by the plaintiff and duly authorised to make the application in the name and for the declared use and benefit of the plaintiff within the meaning of the said Act.

5. The plaintiff and the said Neil McInnis unlawfully and with the intent of violating and evading the provisions of the Waste Lands Alienation Act 1872 prior to and immediately before the application by the said Neil McInnis for the said lands and the making of the said agreements and the plaintiff not being a *bona fide* applicant for the aforesaid lands conspired confederated and agreed together that the said Neil McInnis should select and purchase the said lands as the agent servant and trustee of and for the plaintiff but not in his the plaintiff's name nor for his declared use

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and benefit and should in the event of the said application being granted and of any agreements being entered into pursuant thereto hold the same and the interest thereby created as trustee for the plaintiff would when and as soon as the said Neil McInnis should obtain a grant in fee simple of the said lands or any part thereof pursuant to the said last mentioned agreements transfer the said lands or such parts thereof to the plaintiff and that all moneys payable in respect of the said lands under the last mentioned agreements or otherwise should be paid by the plaintiff and for his benefit but in the name of the said Neil McInnis. And afterwards in pursuance of the said conspiracy and agreement between the plaintiff and the said Neil McInnis and the plaintiff not being a *bona fide* applicant for the said lands within the meaning of the said Act, and the said Neil McInnis not being an agent of the plaintiff duly authorised to make application for the said lands in the name and for the declared use and benefit of the plaintiff within the meaning of the said Act, and with the intent aforesaid the said Neil McInnis made application in the form of the second schedule to the said Act to become the selector of the said lands, within the meaning of the said Act in his own name and for his own use and not in the name or for the use of the plaintiff but with the secret agreement and understanding between the plaintiff and the said Neil McInnis that the said Neil McInnis would on the said application being granted and any such agreement for the sale by the said Commissioner as aforesaid being entered into hold such agreements and the interest in the said lands thereby created as trustee for the plaintiff and for his use and benefit and that all moneys payable preliminary to or under the last-mentioned agreements should be paid by the plaintiff in the name and ostensibly on behalf of the said Neil McInnis but in reality for the benefit and on behalf of the plaintiff and that the said Neil McInnis would as soon as he should have obtained a grant to himself in fee-simple of the said lands or any part thereof pursuant to the said last-mentioned agreements transfer the said lands to the plaintiff and by means of such application the said

Neil McInnis induced the then Commissioner of Crown Lands to enter into the agreement referred to in paragraph 4 hereof such Commissioner being at the time as the said Neil McInnis and the plaintiff well knew ignorant of and the plaintiff having fraudulently concealed from the said Commissioner and suppressed all information with regard to the said secret agreement between the plaintiff and the said Neil McInnis with a view to so inducing such Commissioner to enter into the said agreements as he would not as the said Neil McInnis and the plaintiff well knew have done had he the said Commissioner been aware of the said secret agreement between the said Neil McInnis and the plaintiff And with the intent aforesaid the said Neil McInnis at the request and with the knowledge of the plaintiff entered into the agreements referred to in paragraph 4 hereof and took possession of the said lands and held the same pursuant to and upon the terms of the said secret agreement between the plaintiff and the said Neil McInnis And all moneys paid under the said agreements referred to in paragraph 4 hereof were paid pursuant to the said secret agreement.

6. Ray Parkin Boucaut, a person authorised by the Commissioner under section 15 of the Crown Lands Act 1878, in or about the month of April, 1881, laid an information before a Justice of the Peace for the purpose of holding an examination of the said Neil McInnis, the person holding the said lands under the said agreements, touching and concerning the lands held by him, and the compliance with or the breach or violation by the said Neil McInnis of the provisions of the Crown Lands Act of 1878 and the Waste Lands Alienation Act of 1872 and the terms and conditions of the said agreements and the said Justice thereupon issued his summons under the said section 15 requiring the said Neil McInnis to appear at a certain time and place before such Justices of the Peace or Special Magistrate as might then be there, and to continue in attendance until discharged to be examined touching and concerning the several matters and things referred to in the said information.

7. One Henry J. Smith, Special Magistrate of the said province, in the month of April 1881 in the Local Court house,

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Narracoorte, examined the said Neil McInnis under the said summons, and also examined the plaintiff, the said Ray Parkin Boucaut and Harry Drakeford Hall, George Young, Joseph Riddoch, Henry Holmes and Mortimer Ryland, who had been summoned to appear under section 16 of the Crown Lands Act of 1878. Such persons were examined upon oath administered by the said Special Magistrate, and their evidence was taken down in writing and signed by the respective persons examined and forwarded to the said Commissioner by the said Special Magistrate.

8. The said Commissioner upon the said evidence found that the said Neil McInnis had been guilty of fraud under the Waste Lands Alienation Act of 1872 inasmuch as he had in violation of the said Act and the regulations in behalf duly made selected the said lands for other purposes than that of himself becoming the *bona fide* purchaser thereof and the said Commissioner revoked the said agreements pursuant to the statutes in that behalf.

9. The said finding of the said Commissioner and the said revocation of the said agreements were based upon the fact, which appeared upon the said examination, that the said Neil McInnis had unlawfully selected the said lands as agent, servant, or trustee of or for the plaintiff and that the plaintiff and the said Neil McInnis had agreed with the intent of violating and evading the provisions of the Waste Lands Alienation Act of 1872, that the said Neil McInnis should select the said lands as agent, servant or trustee of or for the plaintiff.

9A. The Commissioner of Crown Lands and Immigration upon the said evidence found the facts set forth and alleged in paragraph 5 hereof as amended.

10. The plaintiff being examined upon oath under the provisions of the Crown Lands Act of 1878 at the Local Court house, Narracoorte, in or about the month of April 1881, before Henry J. Smith, a Special Magistrate for the said province, wilfully made a false statement, namely that he did not make the advances (meaning certain advances which the plaintiff had made to certain persons including certain advances which the plaintiff had made to the said Neil McInnis for the first and second instalments of interest

in respect of the said lands) to secure any right to the property (meaning among other properties the said lands comprised in the said agreements) whereas in truth and in fact the plaintiff did make the said advances to the said Neil McInnis to secure a right to the said lands.

11. Since the month of June 1888 the plaintiff has been and still is a member of the District Council of Narracoorte. The road from Border Town to Narracoorte is a main road and is on the second schedule of the Roads Act 1884 and is not an unimproved road within the meaning of section 286 of the District Councils Act 1887. The plaintiff has for many years up to the date of the alleged libel owned or been in possession of lands on each side of the said road and before the month of June 1888 the plaintiff unlawfully erected three or more post and rail and wire fences completely across the said road, thus enclosing eight or more miles of the length of the said road to his own profit and advantage and to the inconvenience and danger of the public. The plaintiff also placed notice boards on or near the fences so erected by him threatening to prosecute any person injuring such fences or leaving open the gates in such fences and in the middle of such road and the plaintiff in or about the month of September 1888 at a meeting of the District Council of Narracoorte, threatened to prosecute any person who injured the said fences or left open the gates in them and have any such person fined up to £50 and from £5 up to £50.

12. Travellers upon the said road from time to time complained to the said District Council of the obstructions caused by the said fences erected by the plaintiff. These complaints were considered at several meetings of such council. At one of such meetings held on the 9th day of October 1888 a motion was proposed and seconded—"That where the persons who "erected any fences or other obstructions on any main roads "within the district can be discovered twelve hours' notice "be given to them to remove the obstructions; in cases where "the notice is not obeyed or where the erectors cannot be "discovered the Overseer have the obstructions removed, and "the clerk send accounts for the cost of removal of the same "to the erectors when they are known." Such motion was

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amended by inserting "three weeks" instead of "12 hours" and plaintiff as a member of the said District Council voted against such motion.

13. Parts of the said fences across the said road were several times cut down by travellers and unlawfully re-erected by plaintiff.

14. By reason of the facts stated in paragraphs 4 to 13 inclusive of this defence this defendant George Ash says that the words in the said leading article mentioned in the plaintiff's claim, so far as they refer to the plaintiff, and the innuendos in the claim set out, so far as they are warranted by the article are true in substance and in fact.

Symon, Q.C. (for the plaintiff), asked that certain of the pleas of the defendant be struck out.

Symon, Q.C.—We submit that the defence that the libel is true in substance and in fact is not justification for this libel. The pleas are insufficient to show a reasonable answer. Even assuming the truth of the charges, this constitutes no defence. By order lxiii. rule 4, Rules of Court, a Judge has full power to decide whether or not the charges made by the defendants would afford any justification for the libel. If these pleas disclose no justification of the libel, then they ought to be struck out, otherwise we might be kept here for an indefinite time to ascertain facts which are immaterial, because if they are no answer in law, I submit your Honor must withdraw the pleas from the consideration of the jury. The substance of the allegation against the plaintiff is that a selector named Neil McInnis had his agreement revoked because he had borrowed money from Hutchison to assist him to obtain his selection. There is no allegation of any bargain between McInnis and Hutchison. Assuming that Hutchison had been a party to one instance of dummyism eight years ago, that is no justification for a charge of corruption now. There is no allegation that Hutchison was ever put on his trial by the Commissioner. The pleadings do not set out that a specially appointed tribunal ever investigated Hutchison's conduct in any way. The enquiry in regard to McInnis was not an ordinary judicial enquiry, but one simply to decide whether he should be allowed to hold his selection. But supposing that Hutchison had been tried and convicted for conspiracy by the Supreme Court eight years ago, that would not justify the statement that his public record is nearly all a defiance of any law that chances to conflict with any of his immediate

personal interest. The object of applying now or before the trial is to prevent waste of time, also to prevent constant objections as to each portion of the evidence. I ask your Honor to strike out all those portions of the defence which are placed on the record to justify the libel.

Grundy (on the same side)—Pleas of justification must always be construed strictly, and the proof of one instance of misconduct cannot excuse an accusation of general or habitual misconduct. *Odgers* (2nd ed. 173). Because a Commissioner of Crown Lands was of opinion eight years ago that Hutchison and one McInnis committed dummyism under The Waste Lands Alienation Act, no justification is provided for saying that Hutchison was a convicted rogue and an acknowledged perjurer. Dummyism is what may be styled a manufactured fraud. No such offence existed until the fraud was created by a special Act, and dummyism is not inherently wicked or sinful. Even if Hutchison made a false statement in respect of his advances to McInnis, the defendants cannot describe Hutchison as an "acknowledged perjurer." The justification must be as broad as the charge.

Nesbit (contra)—This application is wholly unprecedented. It is an attempt to withdraw matters from the proper tribunal—that is the jury. If the application is granted the trial will be reduced to a mere farce. I submit that such a motion as this can only be entertained where the defence is wholly frivolous. See *Chitty's Practice* (14 ed. 325). The plaintiff should have raised this point in Chambers and have given notice. It would be unjust, after the defendants have gone to great expense in bringing witnesses from the South-East, to prevent the evidence going to the jury. The spirit of the new rules of Court is that everything shall go to the jury unless an objection is taken on a point of law and raised in the pleadings. The learned counsel for the plaintiff have assumed that the Judge will usurp the functions of the jury. It is for the jury to weigh all the facts. The substantial charge against Hutchison is that he has been guilty of misconduct, and not that a tribunal specially appointed by the Government has found him guilty of misconduct. We are prepared to prove this misconduct. If the Neil McInnis incident were not on the record your Honor would direct the jury that there was no justification as far as that part of the libel is concerned. See *Odgers* (2nd ed. 170)—"If any material part be not proved true "the plaintiff will recover damages in respect of such part." See

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Bishop v. *Latimer* (4 L.T. 775) as quoted in *Odgers* (2nd ed. 173). There is only one arguable point which our plea may not cover, namely the charge "of having been found guilty by a specially appointed "tribunal," &c. The sting of the accusation against the plaintiff is not that he was found guilty, but that he was guilty. The charges made in the article are that Hutchison was guilty of dummyism and perjury; also, of a Common Law misdemeanor—*i.e.* fencing over a highway—and of using his influence as a member of the District Council to defeat a motion for having the fences removed. No charge of corruption is made against the plaintiff. The suggestion in the article is that there was no cause for wonder that angry charges of corruption should be made against the Government when persons like the plaintiff continue to hold Justiceships. The defendants could not have pleaded in a way less embarrassing to the plaintiff, and Mr. Symon's objection is technical in the extreme. The last paragraph in the article, containing the words "convicted rogue and acknowledged perjurer," was not intended to apply to Hutchison, but if the jury find that it is made to apply to him, then the defendants take the risk of saying that the words are justified. If the plaintiff be a perjurer, no additional weight is added to the charge by saying he was an "acknowledged perjurer." The plaintiff by being examined on the case of Neil McInnis was substantially a party to it. In the alleged libel from the words "here and there," &c. to "omniscient" there is no harm, and from "darker blots" to "Hutchison, J.P.," there is no allegation of any corruption between the plaintiff and the Government.

[BOUCAUT, J.—The plaintiff says that the defendant libelled him and said he was corrupt.]

Nesbit—The allegation is the continuance in office.

Symon, Q.C.—See the end of the innuendo.

[BOUCAUT, J.—The substance of the pleas 4, &c. is a charge of conspiracy at Common Law supported by perjury. It is indictable as a misdemeanor.]

Nesbit—This is an offence which might lead to subornation of perjury. Fencing a highway is a misdemeanor, and the use of influence as a member of the District Council to defeat a motion to remove these roads is lawlessness.

[BOUCAUT, J.—You don't ask me to tell the jury this?]

Nesbit—The road question is, I submit, an instance of the plaintiff's lawlessness.

[BOUCAUT, J.—Am I to tell the jury that because Mr. Hutchison has exercised his right of voting at the Narracoorte District Council in a way you may object to, it is evidence of his conduct being nearly all a defiance of law ?]

Nesbit—When a man has done an illegal act in fencing a road, and that as a custodian of the road and a Justice of the Peace, and he makes use of his position to vote against a motion to have these fences removed, I submit that these are matters which the jury ought to consider.

[BOUCAUT, J.—This plea is demurrable at Common Law.]

Nesbit—As to the expressions "convicted rogue" or "acknowledged perjurer," we say—(1st) These do not refer to the plaintiff; (2nd) If they do they are justified. If the plaintiff has deliberately given false evidence for his own purposes, then the words "acknowledged perjurer" are justified. If we prove plaintiff has been a rogue, I submit that actual connection is unnecessary.

Piper (on the same side)—"Pleading" in order lxiii. rule 4 means the whole statement of defence, not some pleas in it.

[BOUCAUT, J.—No. We have frequently struck out distinct pleas.]

Piper—A pleading will not be struck out on the ground that it discloses no reasonable cause of action, unless it is frivolous. *In re Batthyany, Batthyany* v. *Walford* (32 Weekly Rep. 379.) Demurrers are abolished only in name, and rule 4 of order v. of the English rules is not to be so construed as to allow applications under it to take their place. The simplest reference to the land laws of this province shows that dummyism is exceedingly grave misconduct. I submit that Mr. Symon's motion is improper. The defendants ought to have had notice or been asked for particulars. The defendants may justify any part of the libel even if they cannot justify the whole. *Odgers* (2nd ed. 176). Here they deny parts of the libel and plead justification for the rest.

[BOUCAUT, J.—Your plea justifies the innuendo, and you cannot limit it. The rest is covered by "not guilty." I shall rule that you cannot qualify the publication.]

Ash, for himself—I do not justify the "acknowledged perjurer," but I say that if the jury find I did refer to the plaintiff, then I justify. I refer to sec. 17 of The Crown Lands Act of 1882 to show that dummyism is an offence in law, and sec. 276 of The District Councils Act of 1887 as to the management of main roads.

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Hutchison as a councillor was bound to protect the public interest in the road which he fenced in.

Symon, Q.C.—It is not a question of delay. We need not demur, nor need we take out a summons. We have endeavored to save the time of the Court. We could have taken objection to the evidence as it was given and then have asked your Honor to direct the jury that assuming all that was said against the plaintiff was true, there was no justification in law. Rule 4 is not the only thing on which your Honor can rely. See *Dadswell* v. *Jacobs* (34 Ch. Div. 281), and in the case of *Batthyany* (*sup.*) the Judge had doubts. I submit—(1) That your Honor has power independently of the rules of this Court; and (2) That there is power under rule 4 of order xxv. There is no duty cast upon the plaintiff to correct the defendants' pleas. The defendants have contended that the substance of the case is that the plaintiff was concerned in dummyism, but this is not the charge.

[BOUCAUT, J.—It is not.]

Symon, Q.C.—The charge is that Mr. Hutchison is "retained after," &c. The defendants' argument admits that they cannot justify this. I refer your Honor to the case of *Leyman* v. *Lathimer* (3 Ex. Div. 15, 352), which is the exact converse of the present case. If the charge of being "a convicted felon" had been the only one the defence would be good. So here a charge of being found guilty by a special tribunal could be met by proving that he had been so found guilty. The words "Felon editor" raise the question as to whether or no the editor was guilty of felony. If a writer charges such guilt he must show it. Supposing the plaintiff had been tried and acquitted, must a jury try him again in a civil action? See *Helsham* v. *Blackwood* (11 C.B. 111).

BOUCAUT, J.—I have never felt more difficulty in knowing how to deal with a motion of this kind, and my view of it has altered from time to time during the argument. I am perfectly certain that the plea is highly embarrassing. It is embarrassing in the allegation in the last paragraph of the pleadings that the defendants justify the libel so far as the innuendos are concerned. That may mean anything or nothing. It is embarrassing, too, in the references to the fencing across the road. If the application had been brought before me in Chambers two or three weeks ago, I would probably have struck out the paragraphs giving the plea of justification or ordered an amendment. The arguments of Mr. Nesbit and Mr. Piper show

me, at all events, that I ought to be careful in exercising the power of striking them out now. They have not convinced me that I have no power to strike out. Considering the application in the nature of a demurrer, no doubt the plea is radically bad. There is a gross libel, and the gravamen of it is not justified. It would be demurrable, and no Court would listen for one moment to the plea if it were a plea in Common Law; but under the Procedure Act more license is allowed to prevail, and it seems to me that the license is more and more every day encouraged, and I am beginning to doubt whether the new system of pleading is not like going from the frying-pan into the fire. Immense latitude is allowed now in regard to pleading; still I am not certain that I would not have struck out the plea on the ground of its being demurrable if it had been raised. If I had been dealing with the matter in Chambers apart from witnesses, I would have held that the plea was bad and the demurrer good. But I am influenced here by the latitude given by the modern style of pleading, and because possibly the paragraph containing the words "convicted rogue and acknowledged perjurer" might be read separately from the charge of proved perjury, and I am not prepared to say that the word "acknowledged" was of the essence to the same extent as "proved." I am influenced also by what Mr. Ash has said that to stop the case now means much more serious loss to the defendants than it means loss to the plaintiff if I allow it to go on with the plea remaining. At the same time I regard the plea as a cruel one against the plaintiff. On the whole, as the witnesses are here and the case is on for trial, I think the balance of opinion should be that the case should go on as it is. Mr. Ash, who has shown great ability in defending himself, is entitled to no more consideration in the hearing than Mr. Nesbit. I shall tell the jury that some portion of the libel is not covered by the plea. If there is anything that would have influenced me to grant the application it would be hearing Mr. Nesbit, after complaining that Mr. Symon was anxious that the charges should not be investigated, argue—"We don't say "Hutchison is guilty; we don't plead that he is guilty; but if we can "persuade the jury that he is we are ready to do so." As a Judge I shall not be governed by that argument, and although I refuse the motion at present I reserve leave to Mr. Symon to move later on after evidence that the plea should be struck out, and that the jury should be directed accordingly.

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Nesbit tendered in evidence the *S.A. Government Gazette* of 22nd February, 1883, from p. 730 to p. 738.

Symon, Q.C.—I object. We submit that this is not evidence at all.

For the defence it was proposed to call the Hon. T. Playford to give evidence on a "Hansard" report of a debate in Parliament on the subject of forfeited selections, in which the plaintiff's name was mentioned.

Symon, Q.C.—I submit that the defendants have no right to produce such evidence. Mr. Hutchison was not present. These reports are not evidence.

Nesbit—Faithful reports of Parliamentary as well as legal proceedings may be commented on. *Wason* v. *Walter* (L.R. 4 Q.B. 73, 38 L.J. N.S. Q.B. 34), *Rex* v. *Wright* (8 Term Reports, Durnford and East 293). I rely partly on the fact that "Hansard" is published with the authority of the Government.

Symon, Q.C.—I do not admit that.

Nesbit—I submit that the Court must assume that publication of Parliamentary proceedings is practically sanctioned by Parliament, and I also submit that the Court can take judicial notice of the fact. Wherever there is a privileged report, such as the report of a trial in a Court of Justice or of a debate in Parliament, or any publication directed or authorised by law, and it states or infers certain conduct on the part of a man holding a public or private position, any public writer acting on the information supplied by such publication is entitled to assume, provided he so honestly and fairly assumes, the truth of any allegations or suggestions contained in such publication. *Ward* v. *Taylor and Another* (7 S.A.L.R. 103), *Hazelgrove* v. *King* (14 S.A.L.R. 192), and *Ward* v. *Derrington* (14 S.A.L.R. 35). I propose to show the existence of the circumstances in regard to which the newspaper article is a fair comment. How is it possible for the Court to say whether Ash wrote the article honestly unless the Court is put in possession of the *Gazettes* and other publications Ash had before him at the time he wrote?

[BOUCAUT, J.—I tell you at once I cannot offhand assent to this. It goes very far.]

Nesbit—I have now got to *Taylor* v. *King* (13 S.A.L.R. 20).

[BOUCAUT, J.—The Chief Justice is supposed to have gone a little outside the cases in his charge in that case.]

Nesbit—I can find support for every word of that proposition in the books. The production of the publications is necessary to show that there is no malice. I can treat the evidence on the plea of fair comment differently from the evidence on the plea of justification. On the former I must show that the defendants had a reasonable belief in the truth of the charges, and dealt out fair criticism. On the latter it will be of advantage to the plaintiff if the defendant attempts to prove him actually guilty of the charge, and he can prove that he is innocent. I refer to *Wason* v. *Walter* (*sup.*). I submit that the occasion here is privileged. See *Ward* v. *Derrington* (*sup.*). I say it comes within the line of fair comment on privileged reports.

[BOUCAUT, J.—As grave charges are made against the plaintiff which may ruin his character, I must be exceedingly careful to exclude anything damaging to him which is not strictly evidence. Nobody can make me believe that defendants would be justified in publishing condemnations of a man's character simply on mere assertions made eight years ago. In *Wason* v. *Walter* (*sup.*) the comments were made at the time of the debate. In the article under consideration the public were not even informed of the grounds for the conclusions given.]

The defendant *Ash*—Your Honor has said in effect that a debate reported in 1881 does not justify an article in 1889, and that the defendants should have commented on the debate at that time. The fact is that the Parliamentary debate on which the article is founded took place in 1883, and the final notices of the forfeiture of the dummied selections appeared in the *Gazette* in 1884. If I were allowed to lead evidence I could reduce the gap in the "public record" to only three weeks previous to the date upon which the article appears. It is impossible for journalists in each article to indicate all the facts and information from which they draw their conclusions. The defendants have a right to defend the action without pleading justification, and surely they could then put in the "Hansard" reports and *Gazette* notices under the plea of "fair comment." Newspapers have been put in before in libel cases under that plea. Although the statements were not made in Hutchison's presence I contend they are good evidence under the plea of "fair comment." At any rate I submit that the "Hansard" reports and the *Gazette* notices ought to go before the jury in mitigation of damages should the jury find for the plaintiff.

[BOUCAUT, J.—It is unnecessary for Mr. Symon to address me on

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this point. I will not absolutely tie myself to any mode in which I shall sum up to the jury, because I do not know what may yet come out in evidence. I am not here to administer common justice between man and man in the way Mr. Ash seems to think, but to give decisions according to law, and when the law is perfectly clear to my mind I shall follow it. Mr. Nesbit has tendered about eight pages of the *Government Gazette*, and has sought to produce evidence of what was said in a Parliamentary debate. It is sufficient for me to say that as to six of the pages of that *Gazette* at all events in my judgment they are not evidence here, because they are clearly and unmistakably *res inter alios actæ*. They are not admissible on that ground, and for the same reason I am inclined to think that the particular notices relating to Neil McInnis are not admissible.]

Nesbit—I shall tender them later on, your Honor. I have not addressed you on them.

BOUCAUT, J., said that he would hear Mr. Nesbit's arguments on them. It would be wholly unnecessary for him to say one word more were it not that he wished Mr. Nesbit to know his views, so that he might be guided as to the future conduct of the case. His Honor said that Mr. Nesbit well knew the principle of law that led his Honor to say that the pages of the *Gazette* were *res inter alios actæ*. There were other grounds on which his Honor thought the pages of the *Gazette* were not admissible, and that made his Honor feel that his decision would be upheld. Going beyond the present occasion, however, he would say for the sake of Mr. Nesbit that if he could show that his Honor was wrong in his decision, or in the view he had indicated, he would hear Mr. Nesbit again on the point, because his Honor was sure Mr. Nesbit would not make any more reference to this matter unless he had something fresh to put before the Court. He had followed Mr. Nesbit patiently in his arguments until Mr. Nesbit reached the conclusion that if Neil McInnis had a notice from the Commissioner of Crown Lands given on account of political motives, in which notice a squatter was concerned, and if by reason of those political motives, and consequent political action, the Commissioner quashed Neil McInnis's right to a credit selection on the ground that he was guilty of dummyism, then a public writer would have a right to say six years afterwards that the squatter was a perjurer and unfit to hold a Justiceship. When Mr. Nesbit came to that his Honor said he could go no further with Mr. Nesbit. That argument could not be justified. On

that ground his Honor thought he should be compelled to reject the evidence, although he did not think the ground was necessary for this case. Mr. Nesbit had called attention to several cases which perhaps his Honor would have to go through in a written judgment sooner or later, but he did not think Mr. Nesbit expected or wished his Honor to delay the case in order that he might do that, therefore his Honor contented himself now with indicating generally the views he adopted. It would be sufficient for his Honor to begin by saying that the case of *Wason* v. *Walter* (*sup.*) is not this case. There the London *Times* published debates on a petition presented to Parliament, and commented on that a day or two after the event. His Honor did not rely here on the fact that the defendants' article appeared many years after the events, although that was a distinction from the case of *Wason* v. *Walter* (*sup.*), but there the *Times* gave an opportunity to the public to know what was being commented on. The debate was printed as well as comments on it; and people could form their own opinion as to whether the comments on the debate and the petition were fair and reasonable. But it was not so in this case. If the statements appeared when the *Gazettes* were published, and certain words were said and the public had them before them, then it would be as in *Wason* v. *Walter* (*sup.*). Then there would be no doubt as to what had induced the comments, and his Honor thought that the published debates or notices would then be admissible. But here the writer set himself up as a Judge to pronounce the plaintiff guilty of certain charges. The writer was not commenting on facts, but he formed an opinion in his own mind and put assertions forward as facts. That was not the same as in the case of *Ward* v. *Taylor* (*sup.*), *Judkins* v. *Thomas* (14 S.A.L.R. 173) and *Hazelgrove* v. *King* (*sup.*). In those cases the libel was undoubtedly comment, and not assertion. It would be sufficient, therefore, to say that for those reasons his Honor held that this case was different from the case of *Wason* v. *Walter* (*sup.*), and that he should accordingly exclude this evidence; but he would not stop there. It would not be just to Mr. Nesbit were his Honor to do so, because Mr. Nesbit looked to him (his Honor) to give him more of what was in his Honor's mind. Now Mr. Nesbit laid down his propositions logically, and it took his Honor a good while to see what Mr. Nesbit was driving at. The learned counsel said first that this was a privileged occasion, and secondly, that what was written was a fair comment on privileged publications. His Honor had dealt with part

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of the second proposition by indicating that he was of opinion that it was not comment at all. There was, in fact, comment on the system of appointing Justices of the Peace, but in commenting on that assertions were made in regard to a particular Justice of the Peace. His Honor held that the *Gazette* was not a privileged publication in the sense in which Mr. Nesbit was pressing his Honor to regard it. It was no more a privileged publication than a leading article in a newspaper or a letter by a private writer. No Act of Parliament had ever made the *Gazette* a privileged channel of communication in the sense in which to his mind Mr. Nesbit's second proposition could alone be justified. Therefore, his Honor got rid of the second proposition. It was not fair comment at all, and the publications on which it was said the comments were founded were not privileged. Then his Honor came to the first proposition. Instead of analysing his Honor's own views he would proceed the other way. He would begin by saying that he adhered to every word of the summing up of his learned colleague the Chief Justice in the case of *Taylor* v. *King (sup.)*, and he followed that summing up so far as it applied to a privileged occasion. But the mistake which was made there was in assuming that that was a privileged occasion, whereas in truth and fact it was not a privileged occasion. His Honor's learned colleague the Chief Justice was misled there. The learned Chief Justice was not called upon there to elaborate the law on the question, owing to the learned counsel for the plaintiff admitting that it was a privileged occasion instead of contesting the point. In that case the Chief Justice acted on the view which the learned Chief Justice Sir Richard Hanson, Mr. Justice Stow, Mr. Justice Wearing, and his Honor Mr. Justice Boucaut himself thought was law, but which Mr. Justice Gwynne did not think was law; and they were all a little off the track except Mr. Justice Gwynne. As Mr. Nesbit had properly said, the law on the subject was unwritten, and so was modified from time to time to suit the changes that took place in the requirements of a nation. That explained why the law in the case of *Wason* v. *Walter (sup.)* had extended the liberty of the press further than it had ever gone before. In that case it was laid down that the occasion was privileged. The right of comment only a little while previously had not been treated as privileged. Afterwards the phrase began to be used with regard to comments in the press, "This is a "privileged occasion." Now, there was a law of privilege in England by which a master could not be made liable if he did tell untruths

about his servant if he did so honestly, and following on the case of *Wason* v. *Walter* (*sup.*) it was supposed in some cases that the privilege to a writer to comment was exactly the same as the privilege of the master in regard to his servant. Counsel there argued the case on that basis and no one called attention to the difference, and therefore it was that the Chief Justice in *Taylor* v. *King* (*sup.*) dealt with the law as if it were a privileged occasion in the same sense as it was between master and servant. Now, the law was not the same in the two cases. A public writer had not the same privilege as a master had in regard to his servant. It was altogether different and distinct, and that was where Mr. Nesbit and his Honor parted company. The law had not been laid down before from the bench in South Australia in the particular way in which his Honor was laying it down now, but prior to this case of *Hutchison* v. *Mather and Ash* his Honor had read and discussed with his learned colleague the Chief Justice various libel actions, and particularly those that had been heard in Victoria, and the bar knew that the learned Chief Justice had moderated his view of *Taylor* v. *King* (*sup.*) and recognised the distinction between the privilege of a master in regard to his servants in the law of England, and the privilege of a writer to comment on public matters, to an extent that the learned Chief Justice did not recognise it when *Taylor* v. *King* (*sup.*) was tried. That was because at the time of *Taylor* v. *King* (*sup.*) the law had not been illustrated as it had been since. The decisions given in Melbourne and Sydney of late did not follow *Taylor* v. *King* (*sup.*), and it was so in England. The summing up in the case of *Taylor* v. *King* (*sup*). was accurate in regard to a privileged occasion, as that was expressly though erroneously admitted to be, but it cannot be followed in all its words in newspaper comments. In the second edition of *Odgers on Libel* (pp. 32, 33), just published, the decisions of the Supreme Court in Melbourne were referred to, and it stated the law as he took it to be at present. Odgers said—"Every one has a "right to comment on matters of public interest and general concern, "provided he does so fairly and with an honest purpose. Such "comments are not libellous, however severe in their terms, unless "they are written intemperately and maliciously. . . It has often "been said by learned Judges that fair and honest criticism in matters "of public concern is privileged. *Henwood* v. *Harrison* (L.R. 7 C.P. "606). But this does not mean that such words are 'privileged by "reason of the occasion' in the strict legal sense of that term. The "defence really is that the words are not defamatory, that criticism

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"is no libel." That was the law. That was the conclusion his Honor came to from consideration of the Victorian cases, and it was exactly *Wason* v. *Walter* (*sup.*) The confusion that had arisen was due to the word "privilege" having to be taken in two senses, instead of only in the sense of the master's privilege in respect of statements he made about his servant. The decision in the case of *Wason* v. *Walter* (*sup.*) did not lay down that "privilege" was to be understood in this latter sense, and such an idea could not be deduced from it. Odgers went on to say—"This is very clearly pointed out by "Blackburn, J., in *Campbell* v. *Spottiswoode* (3 B. & S. 769). If such "criticism was privileged in the strict sense of the word, it would in "every case be necessary for the plaintiff to prove actual malice, "however false and however injurious the strictures may have been; "while the defendant would only have to prove that he honestly "believed the charges himself in order to escape all liability." Odgers said "this is clearly not the law," and his Honor said so too. In support Odgers cited *Campbell* v. *Spottiswoode* (*sup.*), and also *Williams* v. *Spowers and Others* (Australian L.T. May 13th, 1882, p. 113; and 3 *Times* L.R. 432). Here the *Gazette* notices were not commented on; they were not mentioned in the article. Odgers drew the distinction which his Honor would point out to the jury between comment and assertion. A public writer had a right of criticism or comment, but the criticism must not be an attack on the individual, but on his works. "True criticism," says Odgers, "differs from defamation "in the following particulars:— . . . . . "Criticism never attacks the individual, but only his work; . . . "in every case the attack is on a man's acts or on some thing, and not "upon the man himself. A true critic never indulges in personalities, "but confines himself to the merits of the subject matter." What acts of the plaintiff as a Magistrate had been commented on in the defendant's article? None whatever, so that the distinction between the privilege of the writer to criticise and the privilege of the master was now clearly defined and clearly established, and the law which was extended to the master could not be extended to the writer to the same extent. In the summing up in *Hazelgrove* v. *King* (*sup.*) there was a passage which exactly illustrated what his Honor had in his mind as applicable to this particular article so far as it was alleged to be a comment. The learned Chief Justice said—"The virtue of honesty and the vice of dishonesty are matters "of public interest which any public writer is entitled to discuss.

"In doing so he may use very incisive language indeed with "respect to the usage of a trade or anything else open to attack in "dealing with a subject of this kind. But he cannot illustrate his "argument by saying, 'At No. so and so, in Rundle-street, the "practice of dishonesty we are inveighing against is carried on,' "unless he is prepared, in case of an action being brought against "him, to plead and to prove that what he says is true. So any one "dealing with the vice of intemperance cannot single out any "particular person and say he is addicted to habits of intemperance, "unless he is ready to prove it to be true." That was what his Honor said here. In commenting on the appointment of Justices the writer was not justified in singling out a man, and saying he was a moral leper, for the purpose of illustrating his arguments. The comment should be on a particular vice, without any assertion on a particular individual. Therefore, so far as the passage cited was concerned, the learned Chief Justice was at one with his Honor in the views he was enunciating. His Honor did not think it necessary to go through the whole of the argument in the case, because he only wished to indicate the views he was adopting so far as it was necessary for the conduct of the case, and he did not say that his views were not open to reasonable alteration. This was as to the question of fair comment. Now, of course his Honor had very little to say in regard to the plea of justification. If the *Gazette* notices and the reports were once in, then Mr. Nesbit would be justified in using them on the plea of justification. To say that a man was a thief or a rogue, and to set up a few old *Gazettes* in proof would be monstrous.

Nesbit—The *Gazettes* might be a link in the chain.

BOUCAUT, J., was sure that Mr. Nesbit would not say that the notices should go in the plea of justification to prove that the charges were true. For the reasons given he felt that Mr. Symon was clearly and indisputably right in saying that the *Gazettes* and the Parliamentary debates had nothing to do with the case.

Nesbit—Of course the views of your Honor will govern my conduct of the case.

BOUCAUT, J.—Yes; it would be idle for me, after giving this judgment, to receive these things in evidence, and hold myself subject to correction afterwards.

Nesbit—Then in subsequent matters I will tender any evidence of the kind, and ask your Honor to make a note of it.

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July 23.

BOUCAUT, J.—For all I know you may hereafter lead some evidence which may make these *Gazette* notices evidence. I decide now that the *Gazette* notices are not at present evidence, and that it was not a privileged occasion as in the case of a master and servant.

On certain questions being put as to a conversation between the plaintiff and Neil McInnis, deceased, in reference to his credit selections in respect of which the defendants alleged the plaintiff and Neil McInnis had entered into an illegal agreement contrary to the provisions of "The Waste Lands Alienation Act 1872," in pursuance of which (as mentioned in the defence of the defendants, *supra*) it was alleged the plaintiff improperly advanced and lent certain moneys to Neil McInnis.

Symon, Q.C., objected.

Symon, Q.C.—I submit that such a conversation with Neil McInnis, as the case now stands before your Honor cannot be evidence? McInnis had no interest. Any statement he made was directly in favor of his pecuniary interest. Any declaration of his is not against interest, because if true it will save repayment of the money alleged to be lent to him by the plaintiff. This is the evidence on which the jury is asked to convict the plaintiff of perjury. If we were in a Criminal Court could your Honor admit this?

[BOUCAUT, J. —That is the test.]

Symon, Q.C.—I refer your Honor to *Odgers* (2nd Ed. 177), *Sussex Peerage Case* (11 C. & F. 85, and at pp. 110 and 111). This declaration may be against proprietary interest but is expressly in favor of pecuniary interest. *Greenleaf* (174). The converse of the proposition as stated in *Greenleaf*, and which proves it, is well stated in *Powell* (196). A declaration must be by one who has no interest to pervert the feelings. Affirmatively, I say the statement was not against his interest; negatively, he had an interest in perverting the truth. The statement is one which does not benefit him and which hurts him. If McInnis said—"I am Hutchison's dummy," it is a statement against us and not against McInnis. It cannot be admitted under the head of perjury. The defendants have disproved the alleged perjury. The statement is made in respect of Walker's case, not that of McInnis. Hutchison was examined in each case, and the depositions in the latter were put in, and there is not a word of the alleged false statement. I refer your Honor to *Taylor on Evidence* (8th Ed. p. 588), at the words "a fourth exception," &c. There are two propositions. The declaration must be—(1) Against

interest of the person making it, and (2) the interest to be shut out must be a pecuniary or other proprietary interest.

Nesbit—The declaration need not be unalloyed with interest. This is bad law. There are cases where the result of the declaration was actually in favor of the person making it. In almost all cases the advantage and disadvantage are mixed. *Stead and Another* v. *Heaton and Another* (4 T.R. Durnford & East 669), *Bradley* v. *James or Jones* (13 C.B 822).

[BOUCAUT, J.—Is it evidence here as on an information for perjury?]

Nesbit—I would refer your Honor to the cases of *Regina* v. *Exeter* (L.R. 4 Q.B. 341), *Sly* v. *Sly and Dredge* (2 P.D. 91).

Symon, Q.C.—"Unalloyed" does not refer to the effect of the interest. I used the word as to the interest itself. Once the evidence is in, this is in for all purposes, even if favorable to the declarant.

[BOUCAUT, J.—I will take note of Mr. Symon's objection, but I permit the questions.]

BOUCAUT, J. (to the jury).—This is an action for libel, and there are three defences. The first is that it was not a libel; the second, that it was a privileged communication, or, in the words of Mr. Nesbit, that it was fair comment; and the third is that it was true. The plea of truth was not put in general words as I put it, but it was a threefold plea, viz. that Hutchison was a fraudulent and wicked conspirator, secondly that he was a perjurer, and thirdly that he had fenced roads. On the first point Mr. Nesbit has told you, and very properly, that it is a case for you alone, and Mr. Ash added to that a great deal which he was perfectly justified in adding—that no Judge could interfere with you in that respect. I can express my opinion and advise you if I choose, according to the authority laid down in certain cases, not as a duty but as a right. But I shall try to avoid doing so. Mr. Symon has told you what a libel is, and said that anything tending to defame a man or calculated to hold him up to obloquy or contempt, or to hold him up to the opprobrium of his fellow-men, is a libel, and Mr. Nesbit has not ventured to differ from that statement, which is accurate. Did the article complained of defame the plaintiff? Did it hold him up to the opprobrium of his fellow-men? That is a question entirely for you. If it is not a libel there is an end of the case. As to whether or not there is a libel, Mr. Nesbit expressed the view that the statements in the article

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are so plain that they do not require innuendos. Then you have the sworn testimony of Mr. Mather that if the statements are not true they are malicious and vindictive, and that if false he (Mr. Mather) would be injuring another without cause. Therefore on that point I need say no more. Next comes the question of the truth of the libel. There are three points on that. First, whether Hutchison was a conspirator; secondly, whether he was a perjurer; and thirdly, whether he improperly fenced in roads. I will say very little on the last point. I think a great deal more has been said about it than was necessary. If Mr. Hutchison were a conspirator, the mere fact of his fencing in roads under the circumstances detailed in the case is comparatively immaterial. If you find Mr. Hutchison guilty of conspiracy, the act of fencing across the roads of course is trifling. On the other hand, if you find that Mr. Hutchison is not a conspirator, then I shall direct you that the question of the roads has no bearing on the subject, standing by itself. If the question was on the fencing of the roads alone, I would not allow it to go to you. With regard to the perjury, I withdraw that from your consideration and I direct you that it is not proven. The plea has to be proved as strictly as if this were a Criminal Court. When a Judge is clearly of opinion that a plea on the record has not been proved, it is his duty to tell the jury so, and therefore I say no more with regard to the perjury plea than that I regret that a gentleman of Mr. Nesbit's standing at the bar should have placed such a plea on the record. I think I should be neglecting my duty if I did not say this. In the Imperial Court of Appeal recently the Master of the Rolls said the Judges disclaimed the idea of a practitioner of the Court not feeling that he had a duty as regards the other side. They considered that it was the duty of counsel to fight fair and not to hit below the belt, and that it was incumbent upon a Judge to point that out. Now the reason I make these remarks is because the plea of perjury is directed to the last paragraph in the alleged libel, and Mr. Mather in his evidence said he did not wish that plea put on the record. Mr. Mather gave his evidence very fairly and honorably, and though he said he was bound by certain feelings of loyalty to Mr. Ash, still as a matter of fact he swore that he did not wish that plea put on the record. I have no particular desire to weigh down as against Mr. Nesbit, but I feel it is my bounden duty, where an unwise and improper thing is done to point it out. The plea of justification has been described as

a most dangerous plea, but the liberty of the press does not depend on that plea but upon other considerations. Now I come to the plea of conspiracy. What does that rest upon? Upon two classes of evidence. First there is the alleged act of Neil McInnis, and secondly the declarations made by him and which have been allowed in evidence on the principle that declarations against a man's interest can be received in evidence after his death. I will not worry you by going through the whole of these acts and suggestions with regard to Neil McInnis and Hutchison, but they began by sending up money to Mr. Young. Mr. Symon said—"Was "it a crime for a man to try and help an old servant?" and I should be very sorry to think that a jury would be bound to jump to the conclusion that if a man helped an old servant, as Hutchison said he had done, that he had some sinister object in so doing. It appears from the evidence that Hutchison did help McInnis after the selection was forfeited. And what does the evidence as regards the sheep show? Why that they were found on the selection once or twice, and once in the stubble. Then the rations were got two or three times from the station. If they had been got regularly it would not have been difficult to prove, and had this been a criminal case I should have insisted on that being proved. But there are only a few instances shown, and what is the answer? That it is a common practice, and indeed it is common knowledge that where men are working near a station, and a long way from a township, that they frequently get their rations from the station, and this is largely the case with laborers and road contractors. Of two interpretations you must take the one in favor of innocence. You ought not to take loose general statements as against the positive oath of Hutchison and the positive declaration of Neil McInnis. Then we have heard a great deal about Foster. And what does the evidence of John McInnis in regard to him amount to? He said that Neil McInnis wanted him to plough his land, and when he declined he got Foster to do so. Now there was nothing very wonderful in that, and as far as I can see nothing to connect Hutchison with it. Then I come to the declarations. They are said to have been made by Neil McInnis, but were opposed by Mr. Hutchison's affidavits. You must have it proved to demonstration that the charge of conspiracy is true. The *onus probandi* rests on those who make the charge. Till you have positively made up your minds that all that was said by the other side is true, Mr.

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Hutchison's evidence must have some consideration. You must consider his sworn affadavits, and weigh them strictly. The deposition of Neil McInnis must be weighed also. The law very wisely requires juries to be sure that the correct words of dead men are given, as well as to be sure that the man who narrates them is speaking truthfully, and that his memory is not likely to be warped by prejudice. A great deal has been said in regard to dummyism, and the statements made at the Narracoorte enquiry, but I am inclined to think that when the whole district had its attention devoted to this particular question a man would not be prone to commit perjury, but would be exceedingly careful in regard to what he said. There was undoubtedly an exhibition of feeling on the part of Mr. Sprigg. I am sorry for this. I have known him for a number of years. I had a very great respect for him, and I still have; but I think he has made a mistake, and I am very sorry to see the unfortunate position Mr. Sprigg placed himself in by his readiness to judge another man's character harshly. Then there is John McInnis. He completely contradicted himself in his cross-examination, and said as much in favor of Mr. Hutchison as he did against him. Lynch, too, in his evidence stated that when spoken to by Neil McInnis he said—"You may not lose your selection yet," which did not imply that he thought it was the plaintiff's. I again impress upon you the necessity for most carefully weighing the evidence on the conspiracy point. Mr. Nesbit was good enough to say, in warning you of the dangers that awaited you at my hands, that Judges were too often prone to decide by logical motives instead of justice as between man and man. I did not expect that from Mr. Nesbit, because I am as much desirous of doing justice as between man and man as I am on any grounds of logic, but this part of the case I leave entirely to you. Now I come to the other point—that of privileged communication—and I would not have had to say much about it but for what Mr. Ash said. I heard Mr. Nesbit a whole day on that point, and if I seemed at all impatient with regard to it I desire to express my regret both to him and to Mr. Ash. The point was argued very skilfully, and I gave judgment upon it, and though I have been blamed for allowing it so much time I still think I acted rightly. As I said before I gave judgment on the point, and do not intend to labor it now, but I will say this that in having the point argued at the stage I did I thought it had had the effect of saving a great deal of time, as otherwise it might have taken a month

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or six weeks to have had the case fought out in the way Mr. Nesbit and Mr. Ash desired. I do not think they were disadvantaged by not hearing my judgment on the point, and I will shortly explain the principle involved. It is said that this was a privileged communication, and I ruled that it was not, and it is not the first time I have ruled so. When Mr. Ash stated so he was in error, and he clearly took a mistaken view of the law. I leave you absolutely free in respect to the libel and as regards the plea of conspiracy, but I direct that the plea of perjury cannot be supported. The plea of fair comment as I have ruled has not been sustained. Mr. Ash said that if he had good reason to believe that Mr. Hutchison was not fit to be on the roll of Justices of the Peace he was perfectly justified in saying so. Well, that is not the law, and I have ruled that that is not fair comment. What one man believes cannot be published only because he believes it. Mr. Ash has made strong assertions, and sitting in the judgment seat I am bound to hold that the article was not a criticism but an assertion. Coming to the question of damages, I will ask you to say first, was this a libel? and do you believe the second part related to Mr. Hutchison? Next, do you believe that prior to the application for land by Neil McInnis that he and Hutchison entered into the conspiracy that was alleged? If you find that Mr. Hutchison was not a conspirator, then you ought to give reasonable damages. Should you find it a libel you need not enquire into the question of malice. If you think there was evidence of intent in the mind of the writer which showed hostile personal feeling against Mr. Hutchison, then you will award larger damages than if it were otherwise. In conclusion, I direct you that the occasion was not a privileged one.

Verdict for plaintiff for £250.

FULL COURT
WAY, C.J., and BOUCAUT, J.

1889
August 8.

In the Supreme Court.—In Banco.

IN THE MATTER OF THE COMMERICAL BANK OF SOUTH AUSTRALIA LIMITED, IN LIQUIDATION.

The Companies Act 1864, *rule* 54—*Liquidation—Right of shareholder, creditor, or contributory to be heard on application to a Judge by liquidators.*

The rule as to attendance and appearances of parties on applications by liquidators applies only to applications in litigious proceedings, and not to administrative proceedings where liquidators are seeking advice from a Judge before taking action.

THIS was an appeal against an order made in Chambers by his Honor Mr. Justice Boucaut.

Symon, Q.C., for certain shareholders of the bank.

Grundy and *Gall* for the liquidators.

Symon, Q.C.—This was a motion by way of an appeal against an order of Mr. Justice Boucaut made on July 1, dismissing an application to rescind his own order of June 6 to allow the application by the liquidators, on which that order was made, to be reheard. These appeals are really made by way of a substantive motion. The facts on which the application is based are simply these. The winding up of the Commercial Bank of South Australia was ordered about the month of April, 1886, and an order was made almost immediately afterwards for the appointment of liquidators, giving them a somewhat unusual power to bring actions, but of course it was understood that that was merely for the purpose of using process in order to get in the ordinary assets of the bank. At all events, more than three years after the winding-up order was made the liquidators formed the idea of bringing an action, and a very gigantic action too, against the directors of the company. The foundation of the proceedings on which the claim was based was twofold. One was for the recovery back of something like £90,000 or £100,000 which it was alleged the defendants had payed as dividends out of the capital, and the second was for loss to the bank through negligent management of the directors. As to all of this the shareholders have a very direct interest in it, for it supposed from the records of the winding-up that the whole of the debts had been paid to within 1s. 6d., or rather I should say up to 18s. 6d. in the pound, and the accounts filed in the Court appear to show that there is enough and probably more than enough to pay the balance to the creditors without having recourse to the £6 that is still liable to be paid on the shares.

Grundy—I take a preliminary objection that my learned friend has no *locus standi*.

Symon, Q.C.—The object of this application is to secure a *locus standi*. The effect will be to stay the action till the shareholders can be heard. That being the state of things, therefore I contend that as the shareholders are so largely interested in this claim they have a perfect right to be heard.

[WAY, C.J.—How many shares do you represent, Mr. Symon ?]

Symon, Q.C.—Between 4,000 and 5,000, your Honor. The fact of the matter is that the liquidators have been urged to take action by one or two dissatisfied shareholders.

[BOUCAUT, J.—The Court made an order authorsing the liquidators to bring actions. Some of the proceedings have been rather heavy, and the liquidators have been in the habit of taking out summonses before me as the Judge who has had charge of the case permitting them to bring these actions. When the application was made to me for leave to bring this action I looked into the matter carefully and made the order, although I did not think any such order was necessary. It is a practice that has grown up in the course of the winding-up proceedings in Chambers.

Symon, Q.C.—I venture to think the order was necessary.

[WAY. C.J.—Do you apply to be heard on that order, Mr. Symon ?]

Symon, Q.C.—Yes, your Honor. It is a matter in which the shareholders are very deeply interested. As regards these dividends it is money that has gone into the pockets of the shareholders, and surely the shareholders have a right to interpose in the matter, because it simply means taking the money out of one pocket and putting it into the other. They are the people who are interested in this action. The order does not specify the precise course of action. This is really what happened. An intimation appeared in the newspapers that the liquidators some time in the month of May were contemplating some action of this sort, and immediately afterwards a number of shareholders, including those whose names I have mentioned, consulted their solicitors, and a letter was written to the liquidators on May 17. The letter was one objecting to the proposed action by the liquidators. On May 22 the liquidators through their secretary replied that they had handed it over to their solicitors, who would reply to it. I venture to think that the proper course would have been for the solicitors of these creditors to have

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sent my clients some intimation regarding the matter, but instead of that a fortnight afterwards they apply to the learned Judge in Chambers for an order to bring this action. I say that was not fair, and it was not doing justice to the shareholders whose servants, more or less, the liquidators are. My clients were patiently waiting for a reply when an order was made, and immediately afterwards an announcement was in the newspapers of the issue of the writ. That was the first intimation that the shareholders had that this order had been made.

[WAY, C.J.—It will be impossible to have a liquidation carried on if the actions of the liquidators are to be harassed at every stage by certain shareholders.]

Symon, Q.C.—I contend that every shareholder is entitled to be heard under rule 54 of the Companies Act of 1864. That rule sets out that "Every person for the time being on the list of contribu-"tories to the company left at the Chambers of the Judge by the "official liquidator, and every person having a debt or claim against "the company allowed by the Judge, shall be at liberty at his own "expense to attend the proceedings before the Judge, and shall be "entitled, upon payment of the costs occasioned thereby, to have "notice of all such proceedings as he shall by written request desire "to have notice of; . . . ." It would be a very serious thing if shareholders liable for say a large amount of calls should not have a chance of being heard.

[WAY, C.J.—It would be impossible for the liquidation to proceed if before seeking any order from a Judge the liquidators were to be compelled to give every one interested notice of such intention. If such a thing were to be made compulsory litigation would simply become a matter of impossibility. The liquidators here are the instruments, so to speak, for carrying out the order of the Court, and they have to obtain directions from the Court from time to time. If the shareholders wish to stop the action the proper plan will be by means of a substantive application. Unless there is an express authority to the contrary I feel bound not to interfere with the order of my learned colleague.]

Symon, Q.C.—I submit that as a matter of expense and convenience it would be more convenient and less expensive if all parties concerned are afforded an opportunity of dealing with such matters as this when they first crop up.

[BOUCAUT, J.—It occurs to me that there might be irregularities which could not be seen on the first application, but which would be apparent on a substantive application.

WAY, C.J.—Nothing can satisfy me that proceedings of the kind contemplated here cannot be taken unless I am shown an absolute decision on the subject. It is absurd to say that whenever the liquidators wish to get the authority of a Judge before taking any proceedings that every creditor, shareholder, and contributor should be allowed to appear. If such a thing were permitted it would be impossible for the work of liquidation to be carried on.]

Symon, Q.C.—No matter what view the Court may take of the question my clients have a right to be treated with more fairness and courtesy than they have been.

[WAY, C.J.—I quite agree with you.]

Symon, Q.C.—I should have been quite satisfied if my letter had been brought under the notice of the learned Judge, because in all probability if Mr. Justice Boucaut had known of that letter he would have said when the application was made to him—"You had "better let the other side know what you are going to do." However, if the Court says that the rule does not control the proceedings it is useless for me to proceed further.

WAY, C.J.

WAY, C.J.—This is an appeal from a decision of my learned colleague Mr. Justice Boucaut, who has charge of the proceedings connected with the liquidation of the Commercial Bank of South Australia, for the purpose of authorising certain shareholders to be heard on an application by the liquidators for authority to bring an action against the directors of the company for misconduct in their office. Now, Mr. Symon relies on rule 54 of the Companies Act of 1864 as entitling him to be heard on the application. If he (Mr. Symon) is right in his contention the liquidators would be unable to do anything without giving notice to every shareholder, creditor, and contributor who chooses to attend under that rule, and if that construction were adopted the liquidation would break down. Liquidators would be so harassed before a Judge in their applications to him that it would be impossible for them to state the nature of the case on which they thought of taking action without giving information affecting their case to the person against whom they intended to proceed. In a large company like this, in which the shares are distributed through the whole of the colony, and in which

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the directors themselves are shareholders, it is the easiest thing in the world for a man to obtain shares or get any shareholder to allow his name to be used if a man wished to harass the liquidators. I do not consider the rule applies, and the appeal will be dismissed with costs. In my opinion the rule as to attendance and appearance of parties was intended to apply to litigious proceedings, and not to administrative proceedings where the parties are seeking advice from a Judge before taking steps which affect the other parties. I think my learned colleague was right, and the appeal will therefore be dismissed.

BOUCAUT, J.

BOUCAUT, J.—The views my learned colleague has given expression to are identical with those which I held in Chambers. In acting as I have done I was anxious to save all the expense I could.

Motion dismissed with costs.

In the Supreme Court.—In Banco.

FULL COURT
BOUCAUT and BUNDEY, JJ.

1889
August 15.

IN RE GEORGE BOLLEN AND IN RE THE SOUTH AUSTRALIAN MEDICAL BOARD.

Medical Acts — Ordinance 17 *of* 1844 — *The Medical Act* 1880 — *Medical Board — Power of Board — Qualification of applicant for registration— Mandamus—Practice.*

B. was granted a degree of doctor of medicine by the Hahnemann Medical College at Chicago, in the state of Illinois, in the United States of America, and also a certificate by the State Board of Health of the said state of Illinois, by virtue of which B. was entitled to practise medicine in that state, and hold medical government appointments.

It was proved that on production of his certificate by B. in the other states of the United States of America, that B. was entitled as of course to be granted a certificate to practise medicine and hold medical government appointments in those states.

On a motion for rule absolute for mandamus to be directed to the South Australian Medical Board commanding that Board to register B. as a duly qualified medical practitioner in this province,

Held, that B.'s qualifications entitled him to be so registered, and rule made absolute.

MOTION for rule absolute for mandamus.

J. H. Symon, Q.C., on behalf of George Bollen, having on a previous occasion obtained a rule *nisi* for mandamus directed to the South Australian Medical Board, commanding that Board to register the said George Bollen as a duly qualified medical practitioner, now moved to make the rule absolute.

R. G. Moore (with him *G. N. Hardy*) showed cause—The application is in respect of a prerogative writ and is on the Crown side of the Court. (See Supreme Court Act 1867, ss. 27 and 28.) We object to the proceedings on four grounds, viz.—

1. That the rule *nisi* should not have been granted on the affidavits filed, the said affidavits being defective, and that the rule is improvident.
2. That the rule is bad on the face of it.
3. That even if the Court grant the rule absolute it cannot be enforced.
4. That there are no merits.

We object to the affidavit of Jos. B. Leake which is used to establish Dr. Bollen's qualification. This affidavit contains nothing to show

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what Leake is. The jurat is irregular. The affidavit purports to be sworn in "Chicago." We do not know where "Chicago" may be. The person purporting to be the official before whom the affidavit is sworn described himself as "H.B.M. Consul, Chicago." This is an insufficient description. These letters "H.B.M." should be explained. In the affidavit of Reuben Ludlam also used by Dr. Bollen, the description of Reuben Ludlam as "of Chicago, M.D.," is insufficient. "M.D." might for all we know mean "mail driver." We object to the jurat of this affidavit on similar grounds to those founding our objection to the jurat of the affidavit of Jos. B. Leake. Even supposing this affidavit to be good it is not an affidavit of an expert, and we submit it cannot be used. We do not object to the form of Dr. Bollen's affidavit, but we say that parts of it are not evidence. None of the affidavits show the jurisdiction of this Court. The rule is directed to the South Australian Medical Board and is therefore misdirected, because the South Australian Medical Board is not a corporation. Each member should be cited by name. We submit that the rule cannot be enforced. The Medical Board under its Acts of Parliament performs voluntary and onerous duties. There is no provision for amoval of any practitioner, which makes the matter more important. And so in cases of doubt we submit that the Board should decide adversely to an applicant. No mandamus can lie to direct other than an exercise of discretion. The Board having exercised its discretion the matter is settled.

J. H. Symon, Q.C.—The Board must admit on production of certificate.

[BOUCAUT, J.—If so, the case of *Reg.* v. *The Bishop of London* (Weekly Notes 1889, p. 117) governs this case.] See last paragraph of schedule to Act 193 of 1880.

R. G. Moore.—We say that "foreign state" mentioned in the schedule means "foreign sovereign state" and not a portion thereof. There is no evidence that Dr. Bollen is entitled to practise throughout the United States. The South Australian Medical Board is a judicial and not an administrative body. We maintain that the word "satisfaction" in the Act means "reasonable satisfaction." The Board should lean against applicants—once on they are always on.

J. H. Symon, Q.C.—It is a matter of evidence as to qualification.

R. G. Moore—There is no evidence as to Dr. Bollen having a registered qualification. As to recognition of independency or

sovereignty of a state, see *Taylor on Evidence*, page 3. The writ must be directed to all those who are legally bound to execute it, and to them only, as for instance to "A.B. and C.D. two of Our justices." It is not a writ *ex debito justitiæ*. The papers must show beyond any doubt that Dr. Bollen is legally entitled to what he is asking for. The Court will not interfere with the *bona fide* exercise of discretion.

[BUNDEY, J.—If the discretion be capriciously exercised the Court will interfere.]

R. G. Moore—The affidavits are at large. Anything in the affidavit which is founded on information and belief is inadmissible. The affidavits show no jurisdiction and the absence of no legal remedy. See *Tapping on Mandamus* 294. The consul's certificate is an exhibit to the affidavit and is not on oath, and is worthless in this Court and not conclusive against the Board. Notwithstanding the consular seal the jurat is wrong. In Leake's affidavit it states that "on presenting "his diploma" Dr. Bollen may obtain leave to practise in any state of the United States of America, but there is no evidence of presentation to any State Board of Health. The expression "H.B.M. Consul" is used in the jurats. The letters "H.B.M." are an interlineation.

J. H. Symon, Q.C., in support of the rule—Is a man to go round all the states? Whether the evidence is legal or not is it not sufficient to bring Dr. Bollen's case within the paragraph of the schedule to the Act of 1880? If it is not there must be some other motive or ground which may have influenced the Board. The Board admits qualifications and integrity. The policy of the Act is to ascertain the genuineness of diploma and identity of the applicant. The earlier Act said that the degree was to be approved. Students at the London University pursue ordinary occupation and attend classes in the evening. Finland is a foreign state, also Hungary. In Finland study may be extra-mural or extra-academical. Why should a Finnish doctor be worse off than a doctor in England? The Board is not an examining body.

[BOUCAUT, J.—What is their discretion? It is a judicial one, to be exercised reasonably.]

J. H. Symon, Q.C.—I refer to *Tapping on Mandamus*, pp. 9, 13.

[BOUCAUT, J.—The qualification is by law and not by the Medical Board.]

J. H. Symon, Q.C.—See *In re Nathan* (L.R. 12 Q.B.D. 461). The evidence need not be on oath. The Board ought not to insist on legal evidence—conveyancing evidence would suffice. Petition of right is

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not "other remedy." See *In re Nathan* (*sup.*) at p. 467; see case of *Reg.* v. *The Bishop of London* (*sup.*)

BOUCAUT, J.—This case is somewhat important, and I am very glad to hear Mr. Moore say that he has been instructed to state that so far as Dr. Bollen personally is concerned the Board has no objection to him. Mr. Symon has complained of the length of time which the Board has taken in investigating the case, but I can understand why so long a time has elapsed from the fact that the Board were anxious to get all the evidence they could to satisfy themselves. Of course the Bench knows nothing about medical schools, and we emphatically disclaim any desire to say whether this or that school is the better. The question simply is whether Dr. Bollen has a right to be registered by the Medical Board as a legally qualified medical practitioner or not, and that depends upon the construction of the Act No. 193 of 1880. The points have been skilfully put by Mr. Moore, and if they are investigated it will be found that they really raise the question whether the admission to the status of a legally qualified medical man in South Australia is to be according to law or according to the uncontrolled, absolute, and arbitrary discretion of the Medical Board. If Mr. Moore's arguments are well founded on the point of satisfaction, it really means that the Board may say in regard to a Fellow of the Royal College of Physicians that they are not satisfied with him and will not admit him. Or they may object to a man because he is of the wrong color, or because he is not tall enough, or because they think he belongs to the "old school" of doctors, or even because they are of opinion that there are already enough doctors in the colony. It is true that Mr. Moore says that there must be a reasonable discretion, but still the whole of his argument has been directed to show that the Board's discretion is almost or virtually absolute. Mr. Symon has on the other hand contended that the Board has no discretion to examine into the qualifications of individual applicants, but that the duties of the Board are limited to investigating whether or not an applicant produces a diploma which according to the schedule of the Act will qualify him for practice in South Australia. Mr. Moore's argument really conceded that there must be an absolute discretion, or else that Mr. Symon's contention was right. I think that the true position is that the discretion of the Board is a limited discretion. It is to decide whether or not a sufficient diploma is presented. It is clear that the jurisdiction conferred on the Board by section 4 is not to enquire as to whether

the qualification has been obtained from what the Board considers to be a proper school of medicine, but simply whether Bollen has a diploma which entitled him to practise in a foreign state and to hold Government medical appointments. The Act has to be read with the Medical Ordinance 17 of 1844, which has given a different discretion. Under the Ordinance of 1844 the Board has discretion to examine not only into the identity and qualification, but also as to whether the foreign body which issued the certificate appeared to be of sufficient credit and authority. If the old law existed I apprehend that the Medical Board would have the right to say that the school in which Dr. Bollen studied is not of sufficient status to give him a diploma which could be recognised here. That is one of the reasons why the law is altered. Instead of, as in former times, having the duty to enquire as to whether the school which issues a diploma has a sufficient authority to do so, the Board now has to enquire whether the diploma is sufficient. This Court is bound to express its opinion as to the Board's duty by issuing a mandamus. It has been contended for the Board that a diploma authorising Dr. Bollen to practise in one of the American states is not sufficient, but that it should authorise him to practise in the Federal states, and hold medical appointments under the Federal Government. As at present advised I cannot say that the state of New York is not a "foreign state" under the Act. It has a separate Government and its own laws. It is not necessary for me to go elaborately into that question, but undoubtedly I shall be disposed to say that if it is shown that Dr. Bollen is entitled to practise in a great state like that of New York, it will be no answer to say that that of itself does not entitle Bollen to hold Federal appointments in the United States navy. I can see many reasons tending to show that it can scarcely have been within the contemplation of the framers of the Act of 1880 to say that a man having a qualification to practise in an American state must also prove as a matter of fact that he has similar qualifications to practise in all the other forty-one states of the Union. I pronounce no final opinion upon this matter because it is not necessary for the decision I have to give. I have simply indicated my strong leaning against the Medical Board on this point. But the difficulty has been got rid of, because, according to the affidavits produced, Dr. Bollen is entitled, on production of his certificate in the other states, to get as a matter of course a certificate to practise in those states and to hold Government appointments. In my judgment the case is within the schedule of the Act, and Dr. Bollen is a legally

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qualified medical practitioner if the Board is satisfied that he is the man and has got his diploma. It follows, therefore, that he is entitled to the mandamus.

BUNDEY, J.—I think that the facts should be clearly known to those who may be interested in our decision. An Ordinance was passed in 1844 defining the qualifications of medical practitioners in the province, because previous Acts which had been passed had given no definition of the term "legally qualified medical practitioner," and misapprehension had arisen as to its proper meaning. Amongst a number of other provisions it was provided that the Medical Board should have power to enquire into the qualifications of any regular graduate of medicine in foreign universities which should appear to such Board to be of sufficient credit or authority, or of any person who had been a duly appointed medical officer in Her Majesty's sea or land service. That state of the law placed on the Board the exceedingly invidious duty of enquiring into the certificates, diplomas, or qualifications of foreigners coming to this colony, and the consequence was that an agitation went on for a long time to get a more perfect Act passed I remember the discussions which took place over the Act of 1880. The Bill then introduced contained several clauses, and in the House there appeared to be no likelihood of obtaining a unanimous view from medical gentlemen upon it. That, however, has nothing to do with the present case. The power of the Board to examine into the qualifications of persons with diplomas from foreign universities is done away with. All they have to do is to be satisfied that the person applying has a qualification which will entitle him to practise "in all branches "of medicine in a foreign state, and also to hold Government medical "appointments in such state." It seemed to me at first that if the contentions advanced for Dr. Bollen were correct the Medical Board would be reduced to something very little more than a registering Board. But that is not so, for it is their duty to see that the diplomas come from the proper sources, and that a foreigner coming here has the qualification mentioned in clause 12 of the schedule. That being so, the question arises as to whether or not the evidence adduced ought to have led the Board to have accepted Dr. Bollen's diploma, and to have admitted him as coming under clause 12 of the schedule. Now the question whether or not the applicant is a homœopathist or an allopathist does not come within the discretion of the Board at all, so far as I can see. Whether this is a test as between the Medical Board as allopathists and the applicant as a homœopathist or not, it will be

satisfactory to know on looking at the affidavits that Dr. Bollen is not one of those who has taken up homœopathy merely as a pastime and thought himself qualified to practise, because it is shown that he went in 1873 to the College of Hahnemann, Chicago, and there not only passed all the necessary examinations but wrote an essay which has been referred to in several subsequent medical works. So that in admitting him the Medical Board were not having on the roll of practitioners here a man who has not taken trouble to study and to obtain apparently the highest possible position he can attain as a homœopathist, assuming that his credentials are satisfactory. My learned colleague has dealt with Mr. Moore's objections to the rule. We cannot entertain the technical objections to the affidavits. Mr. Moore has stated that the Board, while having nothing against Dr. Bollen, is honestly convinced that his diploma is not one that they ought to receive. A similar position was taken up by certain commissioners in the case of *In re Nathan* (*sup.*), and the Court there ruled that it afforded no reason why it should not interfere. I feel that I have no option whatever but to agree with my learned colleague that the applicant in this case is entitled to have the rule made absolute. If the result shows the Medical Board how powerless they are under the present law, that is a matter for the Legislature and not for this Court.

Rule absolute for mandamus.

FULL COURT

BOUCAUT and BUNDEY, JJ.

1889

August 27.

In the Supreme Court.—In Banco.

MITCHELL *v.* FRANKHAM.

Police Act 1869-70, *sec.* 59—*Indecent language.*

In the Police Court, Port Augusta, the defendant was fined for using the following language to the complainant—"Go out of this, you went down the country to get a kid;" or, "You went down the country and brought that kid back."

Held, that these words were not indecent or obscene.

THIS was a special case stated by the Police Court, Port Augusta.

W. V. Smith for the appellant, the defendant—I submit that these words are not indecent and that the conviction was wrong.

The *Crown Solicitor (Stuart)*—I contend the words are indecent. Indecency means anything unbecoming, unfit, unsuitable, or improper.

BOUCAUT, J.—This case is a very trumpery one. I do not consider the words indecent or obscene.

BUNDEY, J., concurred.

Conviction quashed.

BOUCAUT, J.

In the Supreme Court.

1889
October 15, 23.

ROACH *v.* THE STOCK EXCHANGE OF ADELAIDE INCORPORATED.

Injunction—Interim order—Stock Exchange—Rights and privileges of member—Suspension of member—Notice of charges to accused member—Rules of Exchange.

R., being a member of the Stock Exchange of Adelaide Incorporated, sent out a business circular to which the Exchange objected.

R. refused to unconditionally withdraw the circular.

At a meeting of the members of the Exchange, Rule 13 of the Exchange, which required notice to be given to an accused member of the holding of a special meeting to hear charges against him was by virtue of Rule 61 suspended, and R. was thereupon suspended from his rights and privileges as a member of the Exchange.

No charges were preferred against R., nor was any notice given him in accordance with Rule 13 of the Exchange.

Rule 47 of the Exchange provided that no member should be suspended unless three-fourths of the members should agree to such suspension. This rule was not complied with.

Held, that the suspension of R. was illegal, and an injunction until the hearing of this action granted.

Sir John Downer, Q.C. (with him *Bleechmore*), obtained an interim order in the nature of an injunction.

On 15th October, 1889, *Symon, Q.C.*, obtained an order for discharge of the interim order on account of irregularity in the affidavit of R., in support of the interim order and in the interim order itself, and in the course of his argument cited *Bidder* v. *Bridges* (50 L.T. N.S. 287), *Cruzy* v. *Light and Another* (12 S.A.L.R. 13), *In re Johnstone, ex parte Abrams* (50 L.T. N.S. 184), *Bolton* v. *London School Board* (7 Ch. D. 766).

On 23rd October, 1889, *Sir John Downer, Q.C.*, and *Stuart* applied for an injunction.

Sir John Downer, Q.C.—We apply for an injunction to prevent the Exchange from interfering with Mr. Roach's rights and privileges as a member. My client's claim shows that the Exchange refused to take my client's bids in the room, or to take any notice of Mr. Roach whatever. They have, according to the rules of the Exchange, treated him as guilty of "dishonorable, disgraceful, and "contumacious conduct," and I submit to your Honor that there was

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not a tittle of justification for their action. Your Honor has already heard how the Exchange took umbrage at Mr. Roach issuing a circular stating that he would buy and sell shares at a fixed rate of commission. When Mr. Roach subsequently attended a meeting of the Exchange the chairman said—"He still refuses to withdraw his "circular." I do not object to that, but the association passed a resolution under rule 61 that rule 13 should be suspended, and forthwith suspended my client from the exercise of his rights and privileges. The affidavit by Mr. Roach shows that no member of the association preferred any charge of misconduct against him, and that under the rules it was necessary that in order to suspend him three-quarters of the members should vote in that direction, and that this has not been done in his case. The circular complained of was issued by Roach Bros. on September 25, and set out that in future they would advise their clients of the exact prices at which they bought and sold shares, so that clients might know exactly what the brokerage amounted to. Also that they declined to accept any discretionary orders, and in conclusion they set out a fixed scale of commissions. It was at a meeting of the association on October 2 that they called on the plaintiff to withdraw his circular. The letter, which was sent by the secretary, was couched as follows:—"I am directed to inform "you that if you forward to the committee a circular in the following "terms the committee will approve of it:—'As we find our circular "of September 25 last has been irregularly issued, and is contrary "to the rules of the Stock Exchange of Adelaide Incorporated, of "which our Mr. Jno. Roach is a member, we beg to cancel and "withdraw the same.'" Mr. Roach, in reply, said he would issue a notice in the following terms:—"As we find our circular of "September 25 last has been considered by the Stock Exchange of "Adelaide to have been irregularly issued, and is considered by that "association to be contrary to their rules, we beg to cancel and with-"draw the same." The Exchange declined to agree to that, and insisted on their own terms being complied with. Mr. Roach then wrote saying he was ready to issue a circular to his clients in the terms he had proposed, with any reasonable alterations, but he felt it due to his firm that the reasons should be stated for the withdrawal of the circular. The association then suspended Mr. Roach as I have already stated. I submit that the Exchange have acted most harshly as far as my client is concerned, and I accordingly ask for this injunction.

BOUCAUT, J.—There is this difference between the injunction I now make and an interim order. The injunction goes after notice, whereas the interim order goes without notice. The interim order went the other day without any notice, and therefore the injunction was entirely at the peril of the plaintiff, who moved for it, of satisfying the Court that the strict technical rules had been complied with. I expressed no opinion then as to whether it ought to have been an interim order or an injunction, but on conferring with my learned colleague the Chief Justice I felt as he did, namely that it might be open to the Court to grant an injunction instead of an interim order, and I felt that in a case like the present the former would be more serviceable than an interim order. I intend to reserve to myself the right to issue injunctions in the future instead of interim orders, where injustice may be done to individuals in the absence of any injunction, and thus to throw upon the defendant the onus of seeking to have it removed. Should a plaintiff choose to take it in that way I shall be willing to take it in that way too, and I think my learned colleague the Chief Justice will adopt the same practice. I cannot speak for my learned colleague Mr. Justice Bundey, as owing to his illness I have been unable to consult with him on the point. I mention this now because I do not want the bar to understand that it does not follow with me that an *ex parte* injunction is wrong because it is in the form of an injunction and not in the form of an interim order. Coming to this particular case on the merits as put to me by the plaintiff's counsel, it arises out of a quarrel between Mr. Roach and the Stock Exchange, evidently because Mr. Roach was charging less sums for commission than certain members of the Exchange thought ought to be charged. I express no opinion on that as I do not know enough about the matter. It may be that the etiquette of the Stock Exchange as to prices must be kept up in the same way as in the medical, legal, and other professions, but I do not know that the public are so interested in the keeping up of these charges that the making of lower charges by the plaintiff can be considered as very gross evidence against the high morality of the Exchange and its members. However, let that go. At all events, this is the cause of the quarrel. Then the Exchange called on Mr. Roach to withhdraw a circular he had issued to the public regarding his being prepared to charge lower prices. Mr. Roach intimated to the Exchange that he was willing to withdraw the circular; and in my judgment, so far as I can gather from the

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affidavits, nothing more could have been done by anybody than Mr. Roach was ready to do. But this did not appear to satisfy the Exchange committee. They wanted Mr. Roach not only to withdraw the circular but to advertise himself as having issued a wrong circular. I venture to say that this was utterly unjustifiable on the part of the Exchange committee. It is not fair between them and their fellow members that the committee should take such a high stand on a fairly disputable matter, and so far as I am concerned I shall not be disposed to assist them. I can find no rule prohibiting a member from sending out such a circular, and this is an unreasonable attempt to exercise power on their part which, so far as I am concerned, I will not allow. If their rules stood in the way I would not have said this, but I can see no rule which says that a member should withdraw a circular such as that with which we are concerned, and not only do that but advertise himself as having done wrong. At the quarter past 12 meeting of the Exchange on October 9 the chairman stated that Mr. Roach still refused to withdraw his circular. There can be no complaint about that, but there and then the members passed a resolution under rule 61 that rule 13 should be suspended. I must express my astonishment that on so trifling a matter of dispute as this, after Mr. Roach had practically complied with their demand, that the association should have so far trampled on the fair and reasonable rights of a member, and should have suspended the rules which require them to give him notice of any charges that might be made against him, and should have suspended him forthwith. I do not think it was fair. It was inconsiderate. This Court and Judges of inferior Courts have always set themselves against hasty, ill-considered, and tyrannical proceedings of that character. It is only just that a man should be heard. Whenever it is found, as was the case here, that the proceedings are contrary to natural equity and justice, then this Court will see that any rights which may be invaded shall be conserved. Of course if the Exchange does things within its powers and within its rights, well and good. The Court will say nothing. But if people bind themselves by certain rules then they must stand or fall by them. But this is not the case here. The rules of the association say that before a member can be suspended three-fourths of the members must agree to such suspension. The plaintiff in his affidavit says this had not been done, and this being so the suspension was utterly illegal. That being the case, it follows as a matter of right that the plaintiff

is entitled to this injunction. I do not think it is necessary to call attention to anything further. I cannot but express my regret that this litigation should have been proceeded with. From time to time complaints about costs being heaped up by litigation are made, but it appears to me that unless Mr. Roach was to be ruined he was bound to litigate. It is to be greatly regretted that Mr. Roach was not met in a fairer spirit by the Exchange. Therefore the injunction will go until the hearing.

Injunction until hearing granted.

BUNDEY, J. and a COMMON JURY.

1889
September 18

In the Supreme Court.—Matrimonial Causes Jurisdiction.

ANDERSON *v.* ANDERSON AND CLINDENING.

Matrimonial Causes Act 1867—*Order to witnesses to leave Court—Parties to action—Co-respondent.*

On the trial of a suit for dissolution of marriage if an order be made that witnesses leave the Court, a co-respondent who appears and defends will not necessarily be ordered to leave the Court during the giving evidence by the respondent.

THIS was a suit by the husband for dissolution of marriage on the ground of his wife's adultery with the co-respondent. Upon the respondent's counsel calling her to give evidence,

J. H. Symon, Q.C., for the petitioner—I ask that the co-respondent may be required to leave the Court during the examination of the respondent.

Grundy, for the co-respondent—I object. The petitioner remained in Court and gave his evidence after the other witnesses were examined. It is essential that my client should remain. Although the Court has the authority, yet such authority has never been exercised.

BUNDEY, J.—On the authority of *Charnock* v. *Dewings* (3 C. and K. 378) I hold that the co-respondent should not be ordered to leave the Court.

In the Supreme Court,—In Banco.

FULL COURT
WAY, C.J., and BOUCAUT, J.

PRICE *v.* PRICE.

1889
August 8.
September 18.

Real Property Act of 1861—*The Real Property Act* 1886—*The Evidence Act* 1852—*Evidence—Certified copy memorandum of mortgage—Certificate of registration.*

A copy of a memorandum of mortgage under the Real Property Act of 1861, signed and certified as a true copy by the officer to whose custody the original is entrusted, is receivable in evidence under The Evidence Act 1852.

The form—"Particulars entered in the Register Book, vol. "fol. the day of "18 at noon. "Registrar-General"

with a distinguishing number, sufficiently complies with ss. 37 and 38 of the Real Property Act of 1861.

THIS was an appeal from the Local Court of Redruth on the grounds of a refusal by that Court to admit in evidence a certified copy of a registered mortgage under the Real Property Act of 1861.

Bright for the appellant.

W. Symon for the respondent.

Bright—I submit that the certified copy tendered in evidence in the Court below should have been admitted. The certificate of title is evidence of particulars therein set forth and of their being entered in the register book. See the Real Property Act of 1861, sec. 33. By sec. 35 of the same Act it is enacted that an instrument is to be attested by a witness and is to be deemed to and taken to be embodied in the register book and to form part and parcel thereof. The seal of office of the Registrar-General is to be received in evidence. See The Real Property Act 1886, sec. 21; and sec. 3 of that Act defines the meaning of the word "instrument," and as to evidence of due registration see sec. 52 of the same Act. He cited *Lynch* v. *Clerke* (3 Salk. 153), *Sayer* v. *Glossop* (2 Exch. 409, and 2 Car. & Ker. Rep. 694), *Reg.* v. *Weaver* (2 L.R. C.C. 85), *Dr. Leyfield's Case* (10 Co. 92B B.N.P. 227), *Powell* (4th Ed. 334), *Grindell* v. *Brendon* (6 C.B. N.S. 698, 28 L.J. C.P. 333), *Waddington* v. *Roberts* (L.R. 3 Q.B. 579). The certified copy was evidence under The Evidence Act 2 of 1852, sec. 8—which Act is taken from the Imperial Act, 14 and 15 Vic. c. 99 sec. 14. The Real Property Act treats all documents as "instruments," and not as mortgages, &c., and as such they form part of the register book. See the Real

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Property Act of 1861, secs. 35, 37, 38, and The Real Property Act 1886, secs. 50, 51, 53, 56, 57, 67, 128, 134, and 133.

BOUCAUT, J.—Clause 37 of the Real Property Act of 1861 states that a memorial must contain certain requirements which are not shown in the certified copy of the mortgage.

Bright—It appears to me clear that a certificate only is required to be endorsed on the mortgage and the memorial on the certificate of title.

BOUCAUT, J.—We consider this matter a most important one and will withhold our judgment.

Cur: ad: vult.

WAY, C.J.

WAY, C.J.—This is an appeal from the Local Court of Redruth. The plaintiff sought to recover the sum of £490, being half the amount of a mortgage taken in the defendant's name, for which half the plaintiff claimed. The plaintiff also claimed that the defendant was a trustee for him, and he abandoned the sum of £10 to bring the case within the jurisdiction of the Local Court. Mr. Bright for the plaintiff, in order to show the existence of the mortgage, and that it was in the defendant's name, tendered a certified copy of the registered mortgage in evidence. The Court below rejected this copy as evidence, and this appeal is brought against that rejection. The case has been twice argued before this Court. On the first occasion we adjourned it for the purpose of ascertaining what the practice of the Lands Titles Office was with respect to the registration and the certificates of registration of such an instrument as this. Having ascertained that practice, the case was further argued, and I am bound to say that we have had a good deal of difficulty in coming to a decision. My learned colleague Mr. Justice Boucaut with very great hesitation concurs in the judgment I am about to deliver.

The first objection in substance was as to the certificate of registration. When a mortgage or similar instrument is registered it is filed in the office, and bound up with the records, and on registration it becomes a part of the register book which is constituted by the certificate of title. It is incorporated with the register book, and on registration the instrument which previously according to the Acts had no effect whatever under them, has the effect of a deed between the parties on production of the certificate of title therein referred to, and also passes the estate or interest

purporting to be dealt with by the instrument in question. In order to have all these cogent effects the Act requires first, that a memorial shall be endorsed on the duplicate instrument and entered in the register book, stating the nature of the instrument and the day and hour of registration. I am not now quoting from the present Act, but that of 1861, under which this instrument was registered. Under section 38 of the Act of 1861 the Registrar-General is required to "endorse on every instrument so registered a certificate "of the date and hour on which the said memorial was entered in the "register book, and shall authenticate each such certificate by "signing his name and affixing his seal thereto, and such certifi- "cate shall be received in all Courts of Law and Equity as con- "clusive evidence that such instrument has been duly registered." With plain language like that, one would have thought that the department would follow the words of the Act, and would provide in simple form and in terms of the Act a certificate of the facts which are thereby required. Now, what is a certificate? The word "certificate" is derived from two Latin words meaning to "make certain." It is a legal authenticated voucher or a written testimony, in our English language, of the truth of certain facts. With a plain word like that one would have thought it would have been the easiest thing in the world to follow the language of the Act and provide a certificate of the simple facts that are required in order to give the effect to which I have referred. But on looking at the instrument we find (I suppose from a desire manifested all along not to be embarrassed by legal technicalities or strict accuracy of expression) that the department from the very first to the present moment has used a form of its own. In no part of the certificate does the registrar certify to the truth of the statement endorsed. First, there is a number placed on the certificate, and then "mortgage," as if it were a simple endorsement, and then follow two lines with "particulars entered in the register book" on such a day and on such an hour. After a good deal of consideration and some difficulty, and with more on the part, as I have already pointed out, of my learned colleague, we have decided to act upon the maxim, *ut res magis valeat quam pereat.* We have decided that the particulars required by the statute are there. We cannot conceive they were placed there for any other purpose than as a certificate; and although we think that this form of certificate is censurable, we have decided to accept it as a certificate under the

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Act. We, however, do it with so much hesitation that I think my learned colleague joins with me in the recommendation, which I do not hesitate to make myself, that there should be a quieting Act passed for the purpose of confirming these certificates and removing any doubts as to their validity. I certainly recommend the department to follow the words of the Act in future.

So far I have been dealing with the instrument as if the original itself were produced, but at the trial what was produced was a copy. Thus arises another question. First, whether a copy of a certificate may be used instead of the original register book, and secondly, whether the copy tendered is a sufficiently certified copy for the purpose of being used in evidence. The words of the section are "such "certificate shall be received in all Courts of Law and Equity as "conclusive evidence that such instrument has been duly "registered." In the local Evidence Act No. 2 of 1852, with which we are all familiar, and to which Mr. Bright called our attention, section 8 provides "that whenever any book or other document "is of such a public nature as to be admissible in evidence on its "mere production from the proper custody and no Statute or Act ". . . exists which renders its contents provable by means "of a copy, any copy . . . shall be admissible in evidence ". . . provided it purport to be signed and certified as a true "copy . . . by the officer to whose custody the original "is entrusted." A doubt was felt by my learned colleague as to whether this principal Act, the Real Property Act of 1861, does not require that the certificate itself should be produced in order to be received in evidence. But it is manifest that it would be exceedingly inconvenient if the records of the Lands Titles Office had to be carried about to all parts of the colony for the purpose of being produced in Local Courts or before any other tribunals. For instance, there might be a case at Port Darwin in which evidence of a deed of this nature would be required. It would lock up the register books and make them inaccessible if their actual production were necessary. I am of opinion that the language of the Evidence Act is large enough to cover this case, and that the production of the original instrument or entry is unnecessary. This is not the first time this question has come before us for consideration. A case of a similar nature came before us at the time my late and lamented colleague Mr. Justice Stow sat in this Court, and at that time a general direction was given in which all the members of the Court

united, that the Registrar-General was not to produce the original books on the ground of the inconvenience to which I have referred, and that the parties should in every case of this kind take certified copies.

WAY, C.J.

Lastly comes the question as to whether such a certificate as is required by the Evidence Act was produced. Unfortunately the same originality and independence of spirit for avoiding technicalities and forms has been shown by the Lands Titles Office with respect to the certified copy as was exhibited with regard to the certificate of registration. What was obviously required was a copy of the instrument which was registered, and of the certificate which gave it the legal operation in order to make it receivable in evidence. I think the certificate should have referred to the original mortgage and the certificate and other endorsements thereon. Any lawyer drawing a certificate of this kind would have done so in that form. I think, however, that in substance the certificate is there. It included not only a copy of the mortgage but the certificate of registration. It is placed immediately under that certificate, and it certifies the foregoing to be a correct and true copy. The number has to be put on the instrument of registration, and I think therefore, stretching as far as I possibly can the meaning of the language, it may be taken as a certificate of the registration and of the endorsements as well as of the body of the instrument itself.

The conclusion I have arrived at therefore is that this certified copy of the mortgage was a necessary part of the plaintiff's case, and that it ought to have been received in evidence. I regret that the Justices before whom the case was tried did not receive the evidence subject to its rejection by this Court if inadmissible, because, even if the document had not been receivable in evidence, no new trial would have been necessary. The direction in point of law is that this certified copy of mortgage ought to have been received as evidence of the instrument to which it refers.

BOUCAUT, J.

BOUCAUT, J.—As to the second and third points to which my learned colleague refers I say nothing, because they were not argued at the bar. They occurred to my mind in discussing the effect of the first point, which of itself is of sufficient importance, and although my opinion may have differed on the second and third points, this would not have interfered in making this evidence. It would not be fatal to the document being tendered in evidence as evidence of what it refers to. I wish to say that as far as I am

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concerned I did not understand that there was any legal decision of this Court with regard to bringing in the original document from the Registry Office, and I concede and quite concur that it is an admirable regulation and direction. I think that the Judges should give that direction to the officers of the Real Property Act or custodians of other public property. The state of my mind is rather that of doubt than dissension with regard to the views of my learned colleague. I do not know whether I should not have felt bound to have gone more closely into the matter than I have done had it not been pointed out to me that the new Real Property Act uses the word "memorandum" instead of "certificate," and therefore the question which has arisen cannot possibly arise with respect to future transactions. I therefore feel more at liberty to refrain from dissenting from the judgment of my learned colleague, but I indicate to the officers of the department and those concerned that a very important case might arise, and it would be wise, I think, to pass a quieting Act, and render the matter perfectly clear in future. The doubt has arisen in my mind by reason of a tendency (which I have again and again protested against) to depart from the plain words of the Act. It is an exceedingly simple thing to follow the words of an Act of Parliament. I do not want to go into the reason which induces us to depart from the Act, but I greatly regret that I am so constantly troubled here and in Chambers by the tendency of the people to ignore that which is enacted and made law.

Rule absolute for a new trial.

In the Supreme Court.

BOUCAUT, J.

1889
October 31.
November 1.

IN THE MATTER OF THE MOUNT JAMES CONSOLIDATED SILVER MINING COMPANY LIMITED.

IN RE HAYWARD, EX PARTE ALLEN.

The Companies Act 1864, *sec.* 34—*Rectification of register—Removal of contributory on application of co-contributory—Costs.*

At the instance of W. a prospectus was issued inviting applications for shares in a mining company, stating that as soon as 500 shares were applied for by the public the company was to be considered floated.

On the floating of the company a considerable sum of money would enure to W. through his nominees.

Only 351 shares were applied for by the public, when W. (the vendor to the proposed company) put in an application in the name of H. for the remaining 141 shares, but paid no cash in connection with the application.

On the winding up of the company there was a surplus, and A. (a contributory) took out a summons calling upon H. to show cause why he should not be removed from the register on the ground that the application in the name of H. by W. for 141 shares was a fraud, and that the company never was properly constituted.

Held, that the name of H. must be removed from the list of contributories.

H. was ordered to pay the costs of the applicant and of the liquidator; the applicant to have costs as between solicitor and client from the company.

APPLICATION to remove name of F. Hayward from register of shareholders.

Symon, Q.C. (with him *Bayfield Moulden*) for the applicant, G. Allen.

C. C. Kingston, Q.C., for F. Hayward.

Stuart for the liquidator.

Symon, Q.C.—This is as conspicuous a mining swindle as was ever perpetrated in this colony, and the gentleman who is the prime mover in it is Mr. A. M. Wooldridge, of Goodwood Park. His operations were conducted usually by means of various dummies and instruments, one of whom was Hayward, in whose name these shares stand, and one of the others was Mr. Wadham. These people were the willing assistants, and a number of others whose names are mentioned in the affidavit are apparently innocent ones. In the beginning of 1888 there was what has been called the mining boom here, and among concerns that were put in the market—very unfortunately for

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the shareholders as it turns out—was what was known as the Beltana Broken Hill Company. Mr. Wooldridge, apparently seeing the state of the public mind, and particularly in connection with this Beltana concern, conceived the idea of taking up a number of claims adjacent to the Beltana property. He accordingly took up nine claims in close proximity to the Beltana property; none, however, in his own name, but in the names of Jane Hewer, Fredk. Hayward, Wm. Haytread, Fanny Haytread, Bridget Lahive, Susannah Haytread, Florence Haytread, William Hewer, and Mark Wicks. Wooldridge, therefore, conceived the idea of forming a company, and having arranged to get the claims Wooldridge and Wadham then put their heads together and drew up an exceedingly ingenious prospectus, which was calculated to act upon the minds of a gullible public, but on the minds of no one else. Having stated that the object of the syndicate was to purchase nine mineral claims, each containing about 80 acres, close to the Beltana mine, they went on to say—"The great success in "floating the Broken Hill Proprietary Silver Mining Company, and "the very large advance in the value of the syndicate shares in the "adjacent claims is a full justification for forming the present syndi-"cate, and which, on the terms submitted, should be an assurance of "large future profits. The present proprietors offer 750 shares to the "public at £5 each, and of the proceeds will place £2,500 to the "credit of the syndicate, to be expended in the future development "of the property; the balance, together with 250 shares fully paid "up, will be retained by the present proprietors. It is contemplated "that early steps may be taken to form three or four companies out "of the syndicate property, on terms highly advantageous to the "syndicate. An agreement has been entered into between Frederick "Hayward, on behalf of the present proprietors, and W. Wadham, "on behalf of the subscribers for the sale of the property, a copy of "which agreement can be seen at the office of Messrs. W. Wadham and "Company, 102 King William-street, Adelaide, dated February 6, "1888. When the shares now offered are subscribed for a meeting of "the subscribers and proprietors will be duly convened to settle "articles of association, at which meeting each share will have one "vote, and all questions submitted will be settled by a majority of "votes at such meeting." The capital was to be £5,000 in 1,000 shares of £5 each, but although 750 shares were offered to the public the issue of the prospectus did not result in getting that number taken up. The matter accordingly remained in abeyance till April 5,

1888, when an amended prospectus was issued, in which a substantial variation as to the reduction of the number of shares was made, the number of shares to be offered to the public being reduced to 500, and out of the proceeds £1,250 was to be placed to the credit of the syndicate instead of £2,500 as in the first instance. When 500 shares had been applied for a meeting of the subscribers and the proprietors was to be duly convened to settle the articles of association. When the captain of the mine visited the property he reported that it was utterly worthless. No one had ever seen it before, and it was the purest figment that was to be handed over as a mineral property. It was on September 7, 1888, that the manager reported that the property was worthless. A committee was then appointed consisting of the applicant, Mr. Matters, and Mr. Hales to investigate things. On September 18 they wrote a letter to the board of directors protesting against any names being added to the register, and the register was closed from September 21 to October 12. On October 15 a resolution to wind up the company was passed, and subsequent to that 250 shares were placed on the register in Hayward's name, and on October 20 he applied for the scrip of those shares and also 141 shares, which the directors thereupon, and after the winding-up resolution had been passed, issued to him. Three hundred and fifty-nine shares out of the 500 only were applied for by the public. The whole of the money, £5 a share, was paid by the public, the bona fide applicants, and this was paid by Wadham without anyone's authority to Wooldridge's credit in the Union Bank, to which account Wadham added the words "trust account." Wadham said he did not know why he should have paid it to Wooldridge, because the latter said he was not the owner. The thing not having gone off, Wooldridge, on behalf of Hayward, popped in an application for 141 shares in order to make up the balance of the 500. Nothing was paid for them with the application, no money passed, nor was any cheque forwarded with it. The requisite number of shares consequently being applied for the articles of association were settled, and Wooldridge, or Wadham on his behalf, drew a cheque for the money in the Union Bank for £1,250, the amount to be paid over to the company, and handed it over to Wadham, who was appointed secretary. The thing would have fallen through had not Hayward's application for the 141 shares gone in. There are three points which will have to be dealt with on this summons. One is that Hayward being a promoter—assuming him to be honestly a promoter—had no

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right to apply for a single one of these shares offered to the public without the consent of every other applicant. The second point is that even if that were not so, his application was not bona fide; that it was a bogus and colorable application. And thirdly, that the whole thing was a fraudulent conspiracy. The suggestion which is made in regard to the 141 shares is that your Honor must go the length of finding that there was a set-off, though no money was paid. Your Honor is asked in fact to create a payment. The defendant has not the slightest right to participate in the money which has been honestly paid by the legitimate shareholders.

C. C. Kingston, Q.C.—Hayward and those connected with him acted honestly, and I cannot see any cause for the language employed by Mr. Symon.

[BOUCAUT, J.—That is hardly the point. To me it seems that Hayward was merely a dummy, but of course he might be that and still be innocent.]

C. C. Kingston, Q.C.—I venture to ask how can the relations between Wooldridge and Hayward affect the case? Suppose Hayward were the dummy of Wooldridge? He might have been that and been quite innocent. But I submit that that has nothing to do with the case. An application for a share by a man whether a promoter of a company or not is a subscription for a share, and surely there is nothing injurious in a promoter taking up shares, but on the contrary, there is no greater proof of the bona fides of the concern when the promoter takes up shares.

[BOUCAUT, J.—Yes, but Hayward took up the exact number of shares to ensure the syndicate being floated.]

C. C. Kingston, Q.C.—If Hayward had no right to take up 141 shares in the company he had no right to take up a single one. The company enjoyed the right to the mine and £1,250, and they also had a right to have 500 shares taken up, and the shares were taken up. The syndicate got the amount coming to them to the uttermost farthing, and it makes no difference to the members of it whether my client went through the form of handing over a cheque and then got it back or whether he did not. Pushed to its legitimate conclusion the argument advanced by Mr. Symon that Hayward being a promoter of the company had no right to apply for shares in it means that no promoter has a right to apply for a single share in any company which he promotes. That proposition cannot stand, as the fact of promoters taking shares in a company instead of cash is the hall

mark of genuineness which they affixed to the company. I think the cases I cite show that it would be inexpedient for your Honor to exercise jurisdiction, if your Honor has such jurisdiction, in regard to Hayward's title to the shares. *In re Spargo* (L.R. 8 Ch. 407) and *Macdougall* v. *Jersey Imperial Hotel Co. Limited* (2 Hemming and Miller 528).

[BOUCAUT, J.—If I have jurisdiction I will exercise it.]

BOUCAUT, J.—This is an application by Mr. Allen to have Mr. Hayward's name removed from the register of the Mount James Consolidated Silver Mining Company in respect of 141 contributing shares, and secondly, as regards 250 fully paid up shares. The first proposition to which I address myself is that a promoter of a company has a right to take up shares in the company he is promoting. There is no reason whatever to dispute this, but the foundation on which I base my argument is a proposition by Mr. Symon, which is a different one altogether. Mr. Symon did not assert that promoters ought not to buy shares, but that it was not honest for Hayward to have applied for the particular shares under the particular circumstances. Mr. Symon did not say that a promoter of a company had no right to honestly take up shares in a company he was promoting. The second proposition is that there was nothing unlawful in the taking up of claims surrounding a rich mine and floating them into companies. Well, Mr. Symon did not say there was anything unlawful in so doing. The proposition that it was lawful to do so was commented on by Mr. Kingston at length, and though I agreed with him that it was perfectly lawful Mr. Kingston continued. It is perfectly lawful for people to take up part of the Red Sea to dig for the wheels of Pharaoh's chariots and get people to subscribe to a company with that object, providing they make no misstatements. Then the learned counsel Mr. Kingston raised an argument as to the 250 shares, and I at once admitted that in regard to that there is a great deal in what Mr. Kingston said, and possibly in many cases I might have been influenced by the arguments adduced, but when I recollect that the case has been before me thirteen times in Chambers and has twice been argued at great length, and the case of the applicant has been gone into fully, I feel that I would not be doing my duty, despite the cases quoted by Mr. Kingston, if I did not struggle to exercise jurisdiction, more particularly as the defendant has had very liberal costs in respect of the objections which he made. Therefore I have decided

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that I will exercise jurisdiction in the case. The cases quoted by Mr. Kingston practically deal with the question of the discretion of the Court, and not of its jurisdiction, and it appears to me that I have jurisdiction and I am bound to exercise it. What are the facts, putting them shortly—and I do not intend to go through the affidavits and the evidence, as the point to be settled is as clear as daylight. It seems that there was a mining boom on, and Wooldridge conceived the idea of making money out of that excitement, and this was a perfectly proper transaction, for anyone had a right to do so. Wooldridge secured a number of sections round the Beltana Broken Hill mine, drew out a prospectus, got Wadham to act as secretary to the concern and Hayward to act as applicant promoter, or vendor, or in whatever capacity it was necessary for Hayward to act. The directors were really Mr. Wooldridge, who manipulated Hayward and seemed to control the secretary, and the whole thing from the beginning to the end was Mr. Wooldridge. This would have been lawful if ordinary skill had been exercised, no mistakes being made; but mistakes were made, and they entitle the applicant to succeed on his summons. Before I touch on the particular point on which I intend making my order I wish to exclude an argument adduced by Mr. Kingston, and I listened to it with perhaps a little less patience than I might have exercised. Mr. Kingston referred to *Spargo's case*, and said it was agreed that instead of Hayward going through the idle form of paying the money for the shares which he took, he retained what was coming to him from the syndicate at the time. I put it to the learned counsel that this was not in accordance with the memorandum of association. The case quoted was altogether a different one. The company was founded on a prospectus which went forth to the public, but the public not being sufficiently gullible did not swallow the first one issued, so it was put in a more tempting form, and Mr. Symon was right when he said that the withdrawal of some of the shareholders was from the original and not from the terms of the second prospectus. The prospectus set out that when the shares offered to the public were subscribed for, a meeting of subscribers and proprietors was to be held to settle the articles of association, showing that it did not mean allowing the form merely of paying money for shares to be gone through. This is the construction that a man of common sense and a Court of Equity would put on the prospectus. Mr. Wooldridge was Mr. Hayward, and he sent in an application for 141 shares without paying for them, Wooldridge telling him and

Wadham that he need not pay any money; and I look upon that as a trick, an evasion, a sham to float the company to put money into the pocket of Wooldridge. On that ground alone I will make an order against the defendant in respect to the 141 shares. The date of that application is not very important, but it is very significant that Wooldridge did become registered as the holder of one share, so that he could attend the meetings for the winding up of the company to manipulate the secretary and endeavor to satisfy the ignorant shareholders. So with regard to the 141 shares I will say no more. Mr. Kingston said that the 250 shares came under a different category, as it was a bargain and sale. It was after the first resolution to wind up that the 250 shares were put into the name of Hayward, who was really and truly Wooldridge. What was agreed in the original agreement was that the proprietors of the claims should sell to the company, but Hayward was not a proprietor, and did not pretend to be one, but on the evidence he was put up merely as a dummy to be used for Wooldridge in order that the latter might get the 241 shares and a considerable proportion of the money which had been paid by ignorant shareholders, because it cannot be conceived for a moment that this company would have been floated if the truth of the matter had been placed before the shareholders. The agreement was really between Wooldridge and Wooldridge himself. Hayward on behalf of the proprietors was Wooldridge, and Wadham on behalf of the subscribers of the company was Wooldridge. The agreement was that the proprietors should sell, but the proprietors have not sold. I am speaking now of what appears on the title. As a matter of title Wooldridge agreed with himself that the proprietors should sell, but the proprietors did not sell. How could Hayward agree to sell and convey what he had not got? By the memorandum of association and by the original agreement it was the proprietors who were to convey to the company. The whole thing was a scheme to issue shares, not for the working of the company, but for the purpose of getting money subscribed by applicants to put into Wooldridge's pockets. But I say it was not an illegal transaction if no misstatements were made, although it was not a transaction of which a refined mind would approve, and perhaps not an honest way to get money. Any business man has a right to do the same thing, but if people are foolish enough to enter into such speculations they deserve to suffer. The Court does not sit to protect persons wilfully ignorant, or who in a gambling spirit run foolish risks, but where such transactions come before me, and

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flaws in the transactions are proved, the ignorant persons are entitled to be given the advantage of them The flaws I have pointed out entitle Mr. Allen to have Mr. Hayward's name struck off the list of shareholders in respect of the 141 shares as well as the 250 shares.

Order accordingly, the applicant to have his costs paid by the company if not by Hayward. Question as to payment of costs by Hayward reserved.

On further consideration in Chambers, Hayward was ordered to pay the costs of the applicant and the liquidator; the applicant to have costs as between solicitor and client from the company.

In the Supreme Court.—In Banco.

FULL COURT
BOUCAUT and BUNDEY, JJ.

1889
November 5.

MORTGAGE COMPANY OF SOUTH AUSTRALIA LIMITED
v.
FOSTER.

The Insolvent Act 1860—*Sec.* 131 *and Division VI—Mortgage Debt and Interest—Repurchase by Assignor from Trustee of Mortgaged Property after execution by Assignor of Statutory Deed of Assignment—Liability of Assignor-Purchaser to Mortgagees.*

F. being the unregistered proprietor of a certain freehold under the Real Property Act of 1861, executed a statutory deed of assignment under division VI. of The Insolvent Act 1860, to which deed the mortgagees of the freehold assented in writing.

F. subsequently bought back the freehold from the trustees of his assigned estate and in consideration of the production of the title to enable him to become registered proprietor, F. entered into an agreement in writing with the mortgagees that he would pay the principal and interest under the mortgage, and subsequently in consideration of an extension of time for payment of the principal F. entered into an agreement in writing with the mortgagees to pay the principal with interest at a reduced rate.

An action was brought by the mortgagees against F. to recover interest under the mortgage.

Held, that F. was liable notwithstanding sec. 131 of The Insolvent Act 1860.

THIS was a special case stated by the Local Court of Adelaide.

The case was as follows:—

Case stated for the opinion of the Supreme Court.

1. The following is a copy of the claim and appearance in above action:—

CLAIM.

The plaintiff company sue the defendant for £28 12s. 7d. for balance of interest payable by the defendant to the plaintiff company and for moneys paid by the plaintiff company to the use of the defendant as mortgagees in possession of the defendant's property in Gilbert-street, Adelaide.

The following are the particulars:—

To six months interest due June 30, 1889	£45	10	0		
„ Repairs to roof, damage, &c. ...	3	0	11		
„ Water rates	3	2	2		
				£51	13	1
By rents collected to June 30, 1889 ...				23	0	6
				£28	12	7

Dated, 6th day of August, 1889.

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DEFENCE.

The defendant appears, and in addition to the effect thereof pleads—

1. Not indebted.
2. That on the 26th day of August, 1886, he made a deed of assignment under and in pursuance of division VI. of The Insolvent Act 1860 to trustees for the benefit of his creditors, and the plaintiff's claim arises out of a debt, claim, or demand provable under the said deed of assignment, and the contract sued upon was made after the execution of the said deed of assignment.
3. That he is not the mortgagor of the property referred to in the plaintiff's claim.

Dated the 13th day of August, 1889.

On the trial of this action which took place on the 22nd day of August, 1889, the said Local Court found the following facts :—

That on the 26th day of August, 1886, the defendant executed a deed of assignment of his estate under division VI. of The Insolvent Act 1860 to W. J. Brook and B. Culliford as trustees.

That at the time of the execution by the defendant of such deed, he was the unregistered owner of a property over which the plaintiff company held a memorandum of mortgage for £1,400.

The said mortgage was under The Real Property Act, and was given to the plaintiff company on the 31st October, 1883, by one George Truman to secure the sum of £1,400, and contained (*inter alia*) covenants by the said George Truman that he would pay the said sum of £1,400 on the 31st October, 1886, and in the meantime interest at 8 per cent. per annum on such sum in half-yearly instalments.

That on the 10th day of July, 1886, the defendant signed an agreement by which in consideration of the plaintiff producing when required by the defendant at the Lands Titles Office, the title of the said mortgaged property to enable the defendant to be registered proprietor thereof, the defendant undertook to pay the plaintiff all principal moneys and interest as and when the same should become due under the said mortgage and to observe all the covenants and conditions therein set forth, and it was agreed that nothing

contained in the said agreement, which was merely a collateral security, should be deemed to prejudice the rights of the company against the mortgagor the said George Truman.

That on the 19th day of July, 1886, the defendant entered into a written agreement with the plaintiff that the loan under the said mortgage should be renewed until the 31st day of October, 1888, and that the defendant would pay interest on the same in the meantime.

That the plaintiff company assented in writing to the said deed of assignment in respect of the said mortgage security.

That some time in October 1886 the defendant purchased from the trustees of his assigned estate the said property, subject to the said mortgage security, and also other properties for £50, which amount was paid to the said trustees by the defendant. That on the 16th December, 1886, the defendant signed an agreement by which in consideration of the plaintiff company producing when required by the defendant at the Lands Titles Office the title of the said mortgaged property to enable the defendant to be registered proprietor thereof, the defendant thereby undertook to pay the plaintiff all principal moneys and interest, as, and when the same should become due under the said agreement for extension of the said mortgage, and would observe and perform all the covenants and conditions therein set forth without prejudice to the rights of the company against the mortgagor. That on the 24th December, 1888, the defendant entered into an agreement in writing with the plaintiff, that in consideration of the plaintiff forbearing to call up the loan under the said mortgage, the defendant thereby agreed to pay the principal sum of the said loan on the 30th September, 1893, and interest on the same in the meantime at the rate of £6 10s. per cent. per annum at the times and in manner provided by the said mortgage, and also that the said mortgage should continue in force with all its provisions until payment of the moneys thereby secured. The said agreement was thereby declared to be without prejudice to the company's claim against any other person than the defendant.

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1889
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That the defendant accordingly paid the interest due under the said mortgage up to and including that falling due on 31st December, 1888.

That after a subsequent default in payment of such interest, the plaintiff as mortgagee on default in payment entered into possession and received the rents of the said mortgaged premises.

That the interest sued for being that due under the said mortgage for the six months ending 30th June, 1889, amounting to £45 10s. had not been paid, and that after deducting rents so received as aforesaid, there remained due of such interest £22 9s. 6d.

The Court specially found that the said agreements dated the 16th December, 1886, and the 24th day of December, 1888, were entered into by the defendant in furtherance of his interest as unregistered as aforesaid owner, and that they were bona fide and were not made for the purpose of evading the provisions of clause 131 of the said Insolvent Act, and were entered into upon a new consideration subsequently to the said deed of assignment.

No evidence was given for the defendant, nor was he called, but his counsel contended that section 131 of The Insolvent Act 1860 was a bar to the plaintiff's claim. I held that the section 131 did not apply to deeds of assignment under division VI. of The Insolvent Act 1860, and if it did so apply then that each of the agreements sued upon was entered into upon new and good consideration, and was therefore not within the section.

The question for the opinion of the Supreme Court is whether upon the above facts the 131st sec. of The Insolvent Act 1860 is a bar to the plaintiff's right to recover in this action.

If the Supreme Court shall be of opinion in the negative, the judgment of the Local Court, Adelaide, in favor of the plaintiff as for £22 9s. 6d. to stand. If in the affirmative, judgment to be entered for the defendant.

W. Symon for the defendant.

Culross for the plaintiff company.

W. Symon—If there is a new contract I submit it is *nudum pactum*. See s. 180 of The Insolvent Act 1860, and *In re the assigned estate of P.*

Levi & Co. and the Bank of South Australia (9 S.A.L.R. 36) which decides that s. 171 of The Insolvent Act 1860 applies to deeds of assignment. He also cited *Murray and Others* v. *Acraman and Others* (9 S.A.L.R. 69).

[BOUCAUT, J.—I do not see how you apply the words "after his certificate" in clause 131 of The Insolvent Act 1860. I think *Ambrose and Another* v. *Cook* (26 L.J. N.S. Ex. 278) concludes you.]

W Symon—Mr. Foster bought the interest of the trustees in the property subject to the mortgage, and he arranged with the company in order to preserve the property. *Rimini* v. *Van Praagh* (L.R. 8 Q.B. 1). The object Mr. Foster had was to keep the property alive, and he had no intention of paying the old debt. I submit that *Ambrose and Another* v. *Cook* (*sup.*) supports us. There the object of the transaction was not a fraud on creditors. So here the object was bona fide and not in fraud of the Act but simply to purchase back the interest in the property. *Kidson* v. *Turner* (27 L.J. Ex. 492). I submit that the forbearance to call up the principal is no consideration. He also cited *Jakeman* v. *Cook* (L.R. 4 Ex. Div. 26), *Jones* v. *Phelps* (20 W.R. 92.)

Culross cited *Ex parte Joint Stock Discount Company In re Daunt* (L.R. 6 Ch. at p. 459), *Kirkpatrick* v. *Tattersall* (9 Jurist 214).

W. Symon replied.

BOUCAUT, J.

BOUCAUT, J.—In this case the defendant executed a deed of assignment under the arrangement clauses of The Insolvent Act 1860. He was interested in some land of which the plaintiffs were mortgagees, and the interest passed to the trustees of the deed. The defendant bought that interest from the trustees, and made himself afresh an owner of the land, and having done so made an arrangement with them as mortgagees whereby for a lower interest he bound himself to pay the debt. Of course that gave him the advantage not only of lower interest, but the bulk of the property. Well then, by virtue of the 131st sec. of The Insolvent Act 1860, the defendant said he was not liable to pay, as that section released him from any liability after his certificate had been granted to him. Mr. Culross in answer to that said first that there was a new consideration for that. I doubt whether the new consideration is sufficient to support the plaintiff except under some other circumstances. Mr. Culross's argument appears to me to go too far. Baron Bramwell in the case of *Ambrose and Another* v. *Cook* (*sup.*) said—"The statute having "said that a valid new consideration shall not make a contract to pay

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"the old debt binding this cannot be held to be a valid contract "because there was a new consideration. Then what is it that takes "it out of the statute? Every case must be judged by itself. If a "jury had found that the intention was to pay the old debt substantively, that would not do; but it seems impossible to say that an "insolvent may not purchase property which has been mortgaged by "him." But here the learned Special Magistrate in the Court below found it was not a consideration to pay an old debt, but a transaction entered into by the plaintiffs and the defendant, and one not for the purpose of avoiding the provisions of the clause. So the learned Special Magistrate in the Court below put it not on the ground of mere consideration, but on the ground that it was an arrangement bona fide entered into by the defendant not to avoid the provisions of the section. That being the case I think we are precluded by the case I have just cited. Baron Bramwell in that case added—"How "can the purchase be said to be invalidated by the fact that the "transaction included a release of a debt which was not recoverable "by law? In truth the defendant had no intention to pay the debt. "What he wanted was to purchase certain advantages. It is, no "doubt, difficult to draw the line; and I can only say that this case "is not within the statute." I find the same difficulty that Pollock, C.B., found in the case just quoted. It would be very hard on insolvents if they were not allowed to make a new arrangement for buying property in which they were interested. I should have thought it would have been better and wiser if a new purchaser had been found for this property. But this has not been done, and it seems to me that the learned Magistrate in the Court below framed his case for the purpose of showing that it was on all fours with *Ambrose and Another* v. *Cook* (*sup.*) Therefore I think I must find that the defendant is liable to pay on the reasoning in *Ambrose and Another* v. *Cook* (*sup.*) For those reasons in my opinion the judgment in the Court below must be upheld.

BUNDEY, J. BUNDEY, J.—I concur.

Judgment of the Local Court affirmed.

In the Supreme Court.—In Banco.

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WAY, C.J., and BOUCAUT and BUNDEY, JJ.

1888
December 18.
1889
November 5.

IN THE MATTER OF JOSEPH McAFEE DONALDSON, AN INSOLVENT.

Life Assurance Companies Act 1882—*Life Assurance Companies Act Amendment Act* 1885—*The Policies Protection Act* 1887—*The Insolvent Act* 1886—*Insurance Policy payable before death—Endowment Policy.*

On 31st December, 1872, D. effected an endowment insurance for £500 with the Australian Mutual Provident Society Limited, payable, with bonus additions, on 31st December, 1894, or at the death of D. before that date.

On 12th October, 1888, D. was adjudicated insolvent on his own petition, and the said insurance was then subsisting.

Held (Way, C.J., *dissentiente*), that the policy of the said insurance did not vest in the trustees of the insolvency of D., but is protected.

It was not decided whether the policy was protected by The Policies Protection Act 1887 or by the Life Assurance Companies Act Amendment Act 1885.

THIS was a special case reserved by his Honor James Martin Stuart, Esquire, Commissioner of Insolvency, Adelaide, for the opinion of the Supreme Court.

1. On the 31st day of December 1872 Joseph McAfee Donaldson effected an endowment insurance with the Australian Mutual Provident Society under which the assured becomes entitled to receive the sum of £500 with bonus additions on the 31st December 1894 but in case of his death before 31st December 1894 his executors become entitled to the said moneys (a copy of the policy being annexed to the special case and marked A.)
2. On the 12th day of October 1888 the said Joseph McAfee Donaldson was adjudicated insolvent on his own petition.
3. At the time of such adjudication the said policy was in existence and was the property of the insolvent subject to the payment of an advance obtained by the insolvent from the assuring association.
4. The said policy has a present surrender value, and the sum payable on such surrender is sufficient to discharge the advance secured by the policy and to leave a balance in favor of the assured of about £100.
5. On the 20th day of November 1888 the Official Receiver and the Church of England Synod Adelaide an opposing creditor of the said insolvent made application to the Court of

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Insolvency to decide that such policy of assurance is the property of the Official Receiver for the benefit of the creditors of the said Joseph McAfee Donaldson and that the said policy is not protected under The Policies Protection Act 1887.

6. On the 4th December 1888 the Court of Insolvency decided that such policy subject to any legal claim by way of mortgage or otherwise is the property of the Official Receiver for the benefit of the creditors of the said insolvent and that the same is not protected by the above-mentioned Act.

The opinion of the Supreme Court was asked on the following question of law:—

Does such policy vest in the assignee or trustee of the said Joseph McAfee Donaldson's insolvent estate or is the same protected by The Policies Protection Act No. 417 of 1887?

J. H. Symon, Q.C., H. W. Varley and *Glynn* for the insolvent. *Barlow, LL.D.*, for the Official Receiver.

The facts and arguments will sufficiently appear in the judgments.

BUNDEY, J. BUNDEY, J.—This is an appeal from a judgment of the learned ex-Commissioner of Insolvency, in which he found that the policy on the insolvent's life was the property of the Official Receiver for the benefit of the insolvent's creditors. The following are the facts:—

1. In 1872 the insolvent effected an insurance on his life with the Australian Mutual Provident Society for £500 for twenty-two years. If he lived so long he would be entitled to receive the sum assured and all bonuses, &c. in 1894. If he died before that date these would go to his executors, administrators, or assigns.

2. The policy is described as an "endowment policy," or an endowment assurance.

3. The premiums were duly paid since its inception, and at the time of the insolvency it was in all respects a valid and subsisting policy, having between four and five years yet to run before any claim can be made upon the company under its provisions.

Now, previous to the year 1882, upon the insolvency of the assured, his interest under such a policy (assuming it not to have been previously validly assigned, either at law or in equity) would have passed to the official representative of his creditors. The question, therefore, for our determination is—Has the Legislature by

any of the Acts on the subject of insurance passed since that date, either directly or by necessary implication, altered or qualified the rights of creditors in this respect; and, if so, does this particular policy come within the qualification? Since the year 1882 three Acts dealing with life assurance have been enacted, viz. No. 277 of 1882, No. 350 of 1885 (repealing sec. 33 of the previous Act), and No. 417 of 1887. The last-named Act repeals the whole of the one passed in 1885—saving, of course, all rights created under it; it also provided for its own incorporation with the original Act 277 of 1882 and both are to be read as one. The repealed sec. 33 of the original Act is not referred to in the last or 1887 Act; consequently such section is not revived by the repeal of the whole of the Act of 1885 (see the Language of Acts Act, No. 9 of 1872, following 13 and 14 Vict. ch. 21 sec. 5). For the purpose of this case, however, it may be useful to look at the meaning of the original Act as if clause 33 were still in force. When an entire Act of Parliament is repealed, said Lord Tenterden in *Surtees* v. *Ellison* (9 B. & C. at p. 752), it must be considered (except as to transactions passed and closed) as if it had never existed. That is the general rule. But it must be borne in mind that there is a difference in effect between repealing an entire Act and merely repealing a single clause in an Act. In the *Attorney-General* v. *Lamplough* (L R. 3 Ex. Div. at p. 223), Kelly, C.B., said—"No judge ever laid down as law that where a particular clause in an "Act is repealed, the whole Act must be read as if that clause had "never been enacted;" and at p. 227 of the same case Bramwell, L.J., in effect said—"Therefore a Court of Law is entitled to look at the "repealed portion of an Act to see what is the meaning of what "remains of the Act. Otherwise it would follow that an Act of "Parliament, which at one time had one meaning, would by the repeal "of some one clause in it have some other meaning." In endeavoring to construe these enactments I bear in mind as a great authority has said—"That nothing is better settled than that a statute is to be "expounded not according to the letter, but according to the meaning "and spirit of it. What is within the true meaning and spirit of the "statute is as much law as what is within the very letter of it; and "that which is not within the meaning and spirit, though it seems to "be within the letter, is not the law and is not the statute. That "effect should be given to the object, spirit, and meaning of a statute "is a rule of legal construction, but the object, spirit, and meaning "must be collected from the words used in the statute."

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I summarise the result of an examination of the Acts from 1882 to 1887 as follows:—

1. With a view to encouraging persons to insure, and to protecting persons assured (I quote the words of the preamable to the first Act No. 277 of 1882) the Legislature enacted *inter alia* that any "endowment policy" *on human life* should be protected, and should not pass to the creditors of the assured in the event of his insolvency within the following limits as to time and amount, namely—no policy that had not endured for two years was protected at all. After it had endured for that period it was protected to the extent of £200. If it had endured five years to the extent of £500, and after an endurance of seven years to the extent of £1,000, the then maximum amount. It was, to quote the judgment of my learned colleague the Chief Justice in *in re Goodchild* (18 S.A.L.R. p. 122), "intended to protect policies "of insurance against the operation of the insolvency laws."

2. The policies so protected were the policies as defined by the Act, viz. "any contract for assurance, endowment, or annuity on human "life." There is no restriction, express or implied, that I have been able to gather, other than this. So far as the will of the Legislature was expressed, the only requirement was that any of these policies should be bona fide made by the assured on his own life, and should endure at least for two years.

3. The fifth schedule of the Act shows that it was contemplated that such policies might terminate or mature previous to death, as it provides for their discontinuance either by death, maturity, or surrender.

4. The amending Act of 1885, as is clearly apparent from its preamble, was an attempt to still more fully protect the assured and his representatives against creditors. It endeavored to supply the defects brought to light by *Goodchild's case (sup.)* and to extend the protection to his personal representatives in case of the death of the assured. In case of his death or insolvency a statutory trust was created in favor of the class mentioned in schedule B, and it limited his power of appointment either by will or otherwise, to some or one of such class.

5. This Act of 1885, which was the second expression of the will of the Legislature still defined "policy" to mean any contract for assurance, *endowment*, or annuity on the life of the assured, extended their protection in cases of deeds of assignment as well as to adjudications of insolvency, and expressly declared that such policies

(within the limits defined by schedule A) should be protected from all liability to vest in the trustee or assignee in insolvency or to pass to them, and they were freed from all liability to become assets in the hands of personal representatives for the payment of debts.

6. The final Act 417 of 1887, incorporates the first or 1882 Act, and the two are to be read as one; as before mentioned, it repeals the Act of 1885. It extends the definition of the word policy so as to include all moneys "howsoever payable," or which may be paid or become payable thereunder. In all other respects the meaning of the words is still to be ascertained by reference to the original Act and clause 3 of the one under consideration. It provides for the protection of policies made bona fide by any person *on his own life*, and expressly enacts that they are not liable to be seized under any process of any Court, nor are they to vest in any assignee or trustee. They are not liable for his debts after his decease, but he may by his will render them so. If he dies intestate they vest in his personal representative for division amongst those entitled under and in accordance with the statute of distributions. The policy (which includes all money payable under it) is to be the absolute property of the assured. He can dispose of it or its proceeds as he likes in his lifetime, or surrender or otherwise deal with it, and then comes the much greater liberality of the limit of protection. The time is reduced from seven to two years, and the maximum amount protected is raised from £1,000 to £2,000; but it is expressely provided that no further protection than this maximum sum, whether secured by one or many policies, is afforded by the Act.

There are other subsidiary provisions in these Acts that have some slight bearing on the question at issue, but the preceding comprises the whole I think it necessary to refer to upon them. The learned counsel for the respondent, Dr. Barlow, contends that the policy is not protected, because it is not a "whole life policy;" that the meaning of "a policy on his own life made bona fide by any person" does not mean "for part of a life;" that the literal meaning is "for a "whole life;" that it solely refers to the contingency of a man's death, and only contemplates such policies as are in existence at the time of the death of the assured; that this particular policy is not protected, as the Acts are not retrospective; and that conceding all that has been urged by the learned counsel for the appellant, still the policy belongs to the Official Receiver, because by his voluntary insolvency the insolvent has exercised his right of disposition and passed

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his interest in it to his creditors' representatives. In support of the latter proposition he cited *Rochford* v. *Hackman* (9 Hare p. 475). I am unable to agree with any one of the learned counsel's contentions. A policy on the life of a human being for a limited period is nevertheless a policy *on* that life, just as a policy *on* the hull of a ship is a policy *on* that particular hull, though it may only be, and generally is, for a special voyage or limited time. Mr. Symon contends, and I agree with his contention, that to give effect to the argument the Court would have to interpolate the word "whole" before the word "life." Policies on human lives expiring after a series of years are a common and well-known method of insurance. To uphold the respondent's contention a man of 70 years of age, who had paid premiums on an endowment policy for 50 years, which might fall due say when he was 75, would be excluded from the benefit of these Acts. There is, in my opinion, no word in them that warrants such a contention, and it is in direct conflict with the intention they express, viz. to protect the interest of the assured *against his creditors*, and is, I think, asking us to construe such Acts in altogether too hypertechnical and narrow a spirit. It may be urged that the opposite view gives an assured similar rights after only two years have elapsed. Granted, and why not? If creditors know—and they must be taken to know the law—that the policy on a man's life is not a valuable asset, he will receive no credit on the faith of it. If it is still further urged that he sometimes takes means from his creditors to pay the premiums, that argument equally applies to a whole life policy, which is admittedly protected; and, finally, whatever further argument may be adduced the answer is that it is the expressed will of the Legislature. If they have erred (I do not say so and do not think they have done so) there is the constitutional remedy. Our duty is to construe and decide, not to construct or amend, the law. I confess that I have been unable to follow Dr. Barlow's contention that the appellant's insolvency did the very thing the statute expressly says shall not be done, viz. pass his interest in the policy to the Official Receiver by such insolvency. Doubtless there is power given in the Act of 1887 for the insolvent to voluntarily make a disposition, either by deed or will, in favor of his creditors; but that not being forthcoming I am at a loss to understand how or in what respect he has prejudiced the protection this Act gives. Nor can I see any reason for holding that a valid and subsisting policy that has been bona fide originated and continued for 16 years beyond the statutory time is not entitled to as much pro-

tection as any new risk. It will be observed that hitherto I have confined my observations to the words of the Acts, and the deductions I think are to be drawn from them. I will conclude this part of my judgment by observing that the most careful attention I have been able to bestow upon them has forced me to the following conclusions, viz.:—That they show the intent and determination of the Legislature to protect the savings of the assured against his creditors under all circumstances, after the expiration of a certain time and up to a certain limit. That any argument founded on the ground that it was only intended to protect policies accruing due on the death of the assured is answered by the third clause of the Act of 1887, and by the admitted fact that the assured under such a policy could at any time after the two years surrender his policy and obtain the surrender value. That in order to secure the protection of the existing law what is essentially necessary is that a bona fide *policy* on the life of the assured should have endured, or should endure, for two years. That such a policy need not be for a whole life, nor is there, in my opinion, in any definitions of the word "policy" anything to warrant the word "whole" being placed or being implied before the word "life," and it seems to me that whether it matures in the course of years or upon the death of the assured it is equally covered by the protection. That neither the Act of 1882 nor the later Act of 1887 deprived, or deprives, the assured of the fullest power of disposition, either by will or otherwise. That the Act of 1885 did attempt to limit this power, but it was found unworkable, was repealed, and the original or more liberal provision of the 1882 Act was still further liberalised and extended by the Act of 1887—the latest evidence of the will of the Legislature. In arriving at these conclusions I have borne in mind what the late Master of the Rolls, Sir G. Jessel, said in *In re Bethlem Hospital* (L.R. 19 Equity 459), viz.: —"There is such a thing as construing an Act according to its intent, "though not according to its words." On my reading of the Acts this dictum goes much further than is necessary for the purposes of supporting the views expressed. It must also be remembered that this Court has already enunciated no uncertain opinion as to what such intent was when dealing with the original or 1882 Act in *In re Goodchild* (18 S.A.L.R. 120) especially in the judgment of my learned colleague the Chief Justice at page 122. I feel that whilst it is our duty to protect the common law rights of creditors under ordinary circumstances, it is not our duty to strain, to extend, or confer rights where

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none exist, or to endeavor to uphold such as have been abrogated by the express will of the Legislature. On the contrary, I am of opinion that we are bound to give effect to such intention, unless forced to do otherwise by the words of the statutes. As Lord Selwyn says in *Smith's case* (L.R. 4 Ch. 614)—"It is not the duty of a Court of Law or Equity "to be astute to find out ways in which the object of an act of the "Legislature may be defeated." I venture also to think that the view I have arrived at, solely from an examination of the Acts, is supported by authority and reasons outside of their express provisions. We have no English decisions to guide us, as there is no similar law in force in the United Kingdom that I am aware of. The nearest approach to it is the Married Woman's Property Act, 33 and 34 Vic. c. 93, which provides that a policy of insurance effected by a married man on his own life, and expressed on its face to be for the benefit of his wife, or his wife and children, shall not be subject to the control of the husband *or his creditors*, or form part of his estate. *Even if there is fraud on the creditors at its inception, such a policy is not void or voidable*, but if it is proved to have been done with intent to defeat them, such creditors are entitled to receive out of the sum assured an amount equal to the premiums paid out of the money that should have gone for their benefit. In *Holt* v. *Everall* (L.R. 2 Ch.D. at p. 276) Mellish, L.J., says—"That really is the justice of the case." There are, however, some American judgments on statutes identical in principle and object, although not in words, which I think materially aid us. These statutes are held to be in the nature of *exemption laws*, and are liberally construed. Of course such judgments are not binding authorities on a British Court, but the decisions of the superior tribunals in America are receiving much attention of late years from eminent English Judges. Some of the laws such tribunals administer are framed to meet circumstances, and the requirements of a civilisation in many respects consonant with our own. Their considered judgments are therefore entitled to every respect at our hands. This is especially the case where such judgments are upon acts *in pari materia* with our own. Attention will be called to one of such decisions presently that appears to me to be expressly in point; before doing so, however, I wish to deal with the mode in which it seems proper to support the view previously enunciated. If the language of the Acts were unambiguous, then our duty would be to give effect to them regardless of consequences. That they are not clear or explicit is evident from the difference of opinion respecting them existing between

the members of this Court. In *Salkeld* v. *Johnson* (2 Exch. at page 272), a case that gave rise to great difference of opinion among the Judges, they said—"We propose to construe the Act of Parliament according "to the legal rules for the interpretation of statutes, principally by the "words of the statute itself, which we are to read in their ordinary "sense, and only to modify or alter so far as it may be necessary to avoid "some manifest absurdity or incongruity, but no further. It is "proper also to consider—The state of the law which it purposes "or purports to alter, the mischiefs which existed, and which it was "intended to remedy, and the nature of the remedy provided, and to "look at the statutes *in pari materia* as a means of explaining this "statute. These are the proper modes of ascertaining the intention "of the Legislature." As I have already endeavored to give effect to what I conceive is the ordinary sense and meaning of the words of the Acts, and have also pointed out what was the state of the common law, which they purport to alter, it will be only necessary to consider the two latter rules. What then was the mischief and defect of the common law which the Legislature intended should be remedied? This is, in my opinion, put beyond all doubt on a perusal of the preamble and schedule B of the Act of 1885 already referred to. It may not, perhaps, be inaptly described as a legislative declaration that the common law afforded insufficient protection to enable an assured to fulfil the duty recognised and imposed by the universal voice of all civilised nations on every man, to maintain or contribute to the maintenance of his wife and those of whose life he is the author, or those who were the authors of his own life (if the latter are in indigent circumstances). However high a duty it is for a man to pay his just debts, still—as one of the American Judges says in delivering the opinion of the Court on one of the exemption statutes, and in referring to its provisions—"it proceeds upon the theory that the interest "of a man's wife and children in his life and his duty to make "reasonable provision for their support are not wholly subordinate to "the claims of his creditors, and that he may make an irrevocable "settlement of a policy of insurance on his life for the benefit of his "family." It will be apparent that this branch of the subject could be greatly enlarged upon, and to my mind it is too obvious to require further elucidation. I now come to the last rule for assisting us in the construction of these Acts, viz. a comparison with statutes *in pari materia*. In the Californian Statutes of 1868, p. 500, the legislature enacted that "No money, benefit, right, privilege, or immunity

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"accruing, or in any manner whatever growing out of any life insur-
"ance on the life of the debtor, made in any insurance company
"incorporated under the laws of this state shall be subject to lay
"under attachment, execution, or under any original, mesne, or final
"process whatever against such debtor, or be taken, sequestered, or
"reached, by any proceeding supplementary to execution or other
"like proceeding." This protection is limited to policies where the annual premium does not exceed 500 dollars. In the case of *Briggs* v. *McCullough and Another*, tried in the Supreme Court of California in January 1869 (reported in Bigelow's Life Insurance Cases, vol. i. p. 1), it appeared that McCullough had taken an "endowment policy" whereby the Pacific Mutual Life Insurance Company of California agreed to pay him or his assigns, on July 6, 1878 (or sooner if he should die), the amount insured. A judgment was obtained by Briggs, an order was made for the sheriff to obtain this policy, which order McCullough resisted, and he was ordered to be imprisoned for contempt for disobeying it, and he then appealed to the Supreme Court. The Court held that an "endowment policy"—a policy whereby the insurer agrees to pay a certain sum to the insured or his assigns in ten years, or sooner in case of death—is an insurance upon life. It was urged in the above, as in the present case, that the policy was not an insurance on the life in the sense of the statute; but Crockett, J., said at page 3—"The term 'life insurance' is not alone applicable "to an insurance for the full term of one's life. On the contrary, it "may be for a term of years, or until the assured shall arrive at a "certain age. It is simply an undertaking on the part of the insurer "that either at the death of the assured, whenever that event may "occur, or on his death, if it shall happen within a specified term, or "before attaining a certain age, as the case may be, there shall be "paid a stipulated sum. In either form it is, strictly speaking, an "insurance on the life of the party. . . . It is an undertaking to "pay the stipulated sum if he shall die within a specified term, which "is the very essence of life insurance. . . . It is only a new and "additional element in the contract not inconsistent with its other, "which is its chief constituent part, to wit, the undertaking to pay on "the death of the assured within the specified term." Bliss on Life Insurance, at page 7, speaks of "endowment policies" under the head of ordinary form of life insurance as follows:—"Another form of "insurance known as 'endowment insurance' provides for the pay-
"ment of the sum insured to the person whose life is insured if he lives

"a certain length of time, or if he dies before that time to some other "person indicated." Phillips on the Law of Insurance, 5th ed. vol i. page 43, referring to the provisions of a life policy, says a life policy usually contains the following particulars, viz. *inter alia*—"The "amount insured. The period, whether for a life or a term of years;" and in *Paterson* v. *Powell* (9 Bing 329), cited in Bunyon on Life Assurance, second edition, page 1, Tindall, C.J., defined the contract of life assurance to be that in which a sum of money "as a premium "is paid in consideration of the insurers incurring the risk of paying "a larger sum upon a given contingency." The only authority to which I think it necessary to refer, and which at first sight may appear to conflict with the preceding ones, is *Dalby* v. *The India and London Life Assurance Company* (2 Smith's Leading Cases 8th ed. 282), where Parke, B., defined the contract commonly called life assurance as follows:—"The contract commonly called 'life assurance,' when "properly considered, is a mere contract to pay a certain sum of "money on the death of a person, in consideration of the due pay-"ment of a certain annuity for his life, the amount of the annuity "being calculated in the first instance according to the probable "duration of the life;" this may or may not have been a complete definition of what life assurance meant nearly forty years ago, but I do not think it covers the whole meaning of the term at the present day. The leading text books on insurance law, as well as the American decisions, show that it does not do so. Possibly an endowment policy was unknown at that date (1854). Life assurance, like every other class of insurance business, has greatly expanded within the last quarter of a century. If I am not mistaken, endowment policies were introduced by the Americans into the insurance business. Assuming the view I have taken of the last cited case is correct, it will be seen that it is not in conflict with the other authorities quoted, which appear to me to materially strengthen the opinion I have already expressed. To my mind too much importance has been attached to the class or name of the policy—it has had little influence with me. As I read the Acts the question underlying the several exemptions is *bona fides*. There may be a fraudulent withdrawal of the creditors' money for insurance, as there may be for any other fraudulent purpose, and the Legislature foreseeing this limited any protection to a *bona fide* inception (and endurance of a policy for at least two years) —thus, at any rate, making it exceedingly difficult if not impossible in most instances for a fraud to be successfully practised; but should

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such be attempted, and moneys should be appropriated by an insolvent debtor in fraud of his creditors' rights for such a purpose, then it seems difficult to distinguish between moneys so applied and funds placed, or sought to be placed, beyond the reach of creditors, which would ordinarily be held fraudulent and void as against them. Given honesty and good faith and an absence of circumstances that would lead the Insolvency Court to suspect and cast upon it the duty to hold that there was a want of *bona fides* at its inception, I am of opinion that any policy or policies under these Acts that takes into consideration the contingencies and uncertainties of human life, where such policy or policies have endured for upwards of two years and not exceed £2,000 in the whole, are protected, and that the particular policy now under consideration is one of these. I have read and re-read the 1887 Act, and find it impossible to agree with the contention that it was never contemplated that the assured should reduce the amount secured by his policy into his possession under any circumstances. At the risk of tautology, I again call attention to its provisions. It entails no obligation of any kind on the assured after two years. It makes the policy, including all moneys howsoever payable thereby, his absolute property. He may settle or otherwise dispose of it in his lifetime, either in favor of strangers or his relations; and, if he does not reduce it into possession before he dies and makes no will, it enures for the benefit of the latter to the exclusion of his creditors, in whose favor, however, he is also at liberty to provide in his will. The view that I took of this Act on the argument, and that I still hold, is that it discloses an alteration in the policy of the Legislature. The strict statutory settlement policy disclosed by the repealed Act of 1885 was abandoned, and the much more elastic Act of 1887 introduced, leaving greater discretion in the assured—protecting him if honest when initiating a policy, and continuing it for a given period, but allowing him to be unfettered in deciding which would be the best way of utilising the protection; at the same time, however, providing that if he dies without doing anything, his widow and family are protected against his creditors. It may be that this discretion will be abused, and the Legislature may find they have gone too far; that, however is for them, not for us. There is no complete definition of policy in the 1887 Act, and by its provisions it and the 1882 Act are to be read as one. Obeying this imperative requirement, this is what the two combined Acts say—"Policy is any con-"tract for assurance, endowment, or annuity on human life, and the

" word shall include all moneys, howsoever payable, assured thereby, " or which may be or become payable thereunder." My opinion is that this policy in contest is one on human life—that is, one made *bona fide* on the life of a human being, the assured—and that it comes within the meaning of the words of the protection clause, as well as within the spirit, meaning, and manifest intention of the Acts. It would, indeed, be presumption on my part to say that different conclusions may not be drawn from these unsatisfactory and inartistically drawn Acts. It is undoubtedly a difficult case; and recognising its importance to the insuring portion of the community and their creditors, I have dealt with it thus fully. Assuming ambiguity in the wording of the Acts, then, as it seems to me, the authorities and reasons dealt with in the second part of this judgment aid us in intelligibly construing them. We find the objects they have in view are recognised to a limited extent in England, and to the full in America, where not only are their statutes *in pari materia*, but similar policies of insurance are held to be life policies, and to be protected against creditors; moreover, the Homestead Law of America also precludes creditors from touching the home of the family in case of the owner's insolvency—so that this colony is by no means singular in giving effect to the principles embodied in these insurance Acts. It may be there are incongruities, and that some of their provisions are confusing and difficult to reconcile with their avowed object, but it seems to me that our duty is to strive to uphold the manifest intention of the Legislature, if it can be gathered from such Acts as a whole, even though doing so may involve a departure from the strictly logical or grammatical meaning of an isolated clause in any of them. For the reasons stated I am of opinion that the appellant is entitled to succeed, and the judgment appealed against ought to be reversed.

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BOUCAUT, J.—I have had great difficulty in coming to a decision in this case, and I offer my opinion with some hesitation. Still, such as it is, it is to the effect that this endowment policy is protected. Unfortunately I have not been able to set the arguments out as I would have wished, because I have mislaid my notes on the trial. I think, in the first place, that an endowment policy is a life policy within the meaning of " policy on life," and I adopt the words of the judgment of the Supreme Court of California in the case of *Briggs* v. *McCullough* (*sup.*) in Bigelow's Life Assurance Cases, where Crockett, J., says—" The term ' life assurance ' is not alone applicable to an insur- " ance for the full term of one's life. On the contrary, it may be for a

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"term of years, or until the assured shall arrive at a certain age. " . . . . In this case the policy was to become payable on the "death of McCullough, provided he died within ten years, and it is to "that extent certainly an insurance on his life. It is an undertaking "to pay the stipulated sum if he shall die within a specified term, "which is of the very essence of life insurance. The fact that the "company is to pay the agreed sum at the expiration of ten years, "even if McCullough shall not have died in the meantime, does not "divest it of its character of life insurance. It is only a new and "additional element in the contract not inconsistent with its other, "which is its chief constituent part, to wit: the undertaking to pay on "the death of the assured within the specified term." It was then said that an endowment policy is not a policy on life within the meaning of the Act No. 417 of 1887, because the interpretation clause did not apply to section 3 of that Act. The words of the clause are —"Subject to the limitations provided in the next section, no policy "on his own life made bona fide by any person shall be subject to be "seized or taken in execution under the process of any Court, or, in "the event of the insolvency of such person, shall vest in the assignee "or trustee of his estate, or on the death of such person, unless "expressly mentioned and specially directed by will, shall be assets "for the payment of debts, but such policy shall be the absolute "property of such person, and shall on his death, subject to any "disposition made during his life, be held by his legal personal "representatives in trust for the person or persons entitled thereto "under his will or codicil, or, in cases of intestacy, in trust for the "person or persons entitled thereto under the statutes for the distri- "bution of the effects of intestates." I think that the Act No. 277 of 1882 is to be read with the Act 417 of 1887, and section 3 (the interpretation clause) of the Act 277 of 1882 says—"'Policy' means "any contract for assurance, endowment, or annuity on human life, "and 'life assurance business' means the granting of policies." I think the word "policy" in section 3 of the Act 417 of 1887, by force of that reading, means and includes an endowment policy. I cannot bring myself to think that because an annuity may not be or is not within that clause, this endowment policy is not within that clause. Then there is the final part of that clause which goes on to say that "such policy shall be the absolute property of such person, "and shall on his death, subject to any disposition made during his "life, be held by his legal personal representatives in trust for the

"person or persons entitled thereto under his will or codicil." On first sight this no doubt seems to conflict with the portion of the clause which makes an endowment contract a policy, because an endowment policy if it falls in while the assured is alive cannot go to the executor as a policy, because it has been absorbed and the assurer has had the money. But I do not think these words have force enough to exclude the policy in question. These words, I think, are for the purpose of protecting the policy, if existing, for the benefit of the executors. If not existing, of course it could not be protected. I cannot hold, however, that these words are sufficient to get rid of the interpretation clause and of the general force of the Acts, and the construction I put on the word "policy" irrespective of the construction clause, and bearing in mind that the preamble of the repealing Act, No. 350 of 1885, says—"Whereas it is expedient to "amend the Life Assurance Companies Act 1882 for the purpose of "more fully protecting, as against the creditors of persons assured, "the property and interest of such persons"—is to the effect that this policy is protected. Therefore I think the appeal must be successful, and the judgment will go with it.

WAY, C.J.—The question for our determination in this case is whether the sum of £500, secured by this policy, and payable in 1894, or at the death of insolvent should it happen before that date, goes to the insolvent's estate, or whether it is protected for his own benefit. The general policy of the insolvency laws is to give the insolvent a discharge on his surrendering his estate for distribution amongst his creditors. Our insolvency laws, which have been re-enacted several times since the first Act on the subject, provide for certain small allowances to the insolvent—necessaries to the value of £30, and a commission on the amount distributable to his creditors if the dividend is of a substantial character. If this policy of £500, payable in 1894, be protected, so would a policy of £2,000 payable on the day after the insolvent obtained his certificate. In that event the insolvent might begin business again with a substantial capital, whilst his creditors might, and probably would, receive nothing at all. I think that it requires very clear and unambiguous language to indicate a change of policy on the part of the Legislature which would bring about such startling results. If we turn from the principles of insolvency law to the legislation on this particular subject, I think we shall find that the scope of such legislation has been altogether opposed to giving such large benefits to a person who happens to have been

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fortunate enough to expend his own or his creditors' money in an insurance of his life. The whole difficulty has arisen in this colony in consequence of the attempt to make the protection which is given to insurance policies in the event of insolvency mechanical and self-acting. I do not think a complete and unobjectionable protection can be obtained in that way. Three attempts have been made to effect this, but I think the only satisfactory method in which it can be accomplished is by permission to settle the policy for the benefit of the insolvent's family, and, by some act on his part, withdrawing the insurance which is intended to be the object of protection from the general body of his estate. That is the method which has been adopted in England in section 11 of the Married Woman's Property Act of 1882, which is the first English legislation with which I am acquainted on this point. I regret that when the difficulties arose on the construction of the first and second Acts dealing with protected policies in this colony my attention was not directed to this provision in the Married Woman's Property Act, because if it had been so directed I should certainly have suggested that our amending legislation should follow the English lines, and not be directed to what, so far as my experience goes, is the impracticable attempt which has been made here to make these policies self-protecting.

What is protected by the Act which is now in operation—the third Act on the subject, the Act of 1887—is a policy on the "own life" of the assured "made bona fide." Now the word "policy" implies a contract of insurance. It was first applied to marine insurances, and it was then used—because both classes of contracts depended upon a contingency—with respect to life insurance. We have an authoritative definition of life insurance given by Baron Parke, one of the most eminent lawyers who ever sat upon the English bench, that "it "is a mere contract to pay a certain sum of money on the death of "a person." Chief Justice Tindall in another case, also cited by my learned colleague, refers to it as a "contract for payment of money "on a given contingency;" and Bunyon, in his work—the standard English text-book on the subject—gives the following definition of a policy of insurance, that it is a contract "contingent upon the duration "of human life." This definition is cited with approval in the best American textbook with which I am acquainted—Bliss's Life Assurance—and that writer still further elaborates it without introducing any new term into the definition. Before passing on I desire to observe that the *dicta* cited from the decision of the Californian

Court are *obiter*. They were not necessary to the decision of the case. They depended on the words of a statute differently expressed to our statute, and they are neither binding upon us nor upon any other American tribunal. I therefore prefer to stand upon the definitions which have been so well established in English law as to the nature of a contract of life insurance. The instrument before us contains a covenant to pay a sum of money on a given day. Such a covenant as that, standing alone, is not a policy, nor does its being coupled with another kind of covenant make it such. A covenant to pay a sum of money if a person dies before a given date is a policy. The instrument before us is of a compound character. It contains a covenant which is properly termed a policy, and it contains also a covenant, which to call a policy would be opposed to the accepted definitions of the term in English law as being payable on a contingency. In my opinion the Act, which says that a policy on life shall have a certain effect, does not extend to an instrument which contains within its four corners a contract for insurance and a covenant of another character any more than if this instrument contained a covenant to convey an estate on a particular date it could be called a policy of life insurance.

The early life insurance business was confined to life insurance proper, but in England and America the operations of these companies were extended to annuity business, that is to payments of annuities for terms of years or for lives. These had been known in business a great deal longer than life insurance policies had been, and were never called "policies." Then this compound contract to which I have referred was invented and included as a branch of insurance business under the name of "endowment policies." This being the state of affairs, the Legislature of this colony in 1882 passed an Act (No. 277) to regulate the operations of these companies. That was a copy of an English Act, 33 and 34 Vic. cap. 61. Both our local Act and the Imperial statute on which it was founded were intended for the purpose of regulating companies of this kind, and contained for the purposes of these Acts an interpretation clause which extended the meaning of the word "policy" to contracts for the purpose of granting annuities, which were never called "policies" before, and to contracts of this compound character called "endowment policies," which, for the reasons I have stated just now, do not come under the definition of policies of life assurance as laid down in the definitions contained in the English cases.

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Into that Act there was introduced for the first time by section 33 a protection for the assured of any policy on his own life as against his creditors. That was a copy of a section in a similar Act in Victoria, but unfortunately it was not accurately copied. In my opinion the draftsman of that section did not intend to avail himself, nor did the Legislature intend to avail themselves of the interpretation clause at all. The interpretation clause had ample work to do in the other parts of the Act. A new definition of insurance—"any policy on the life "of such person"—was introduced in that section to which, as I consider, *ex vi termini*, the definition clause was not applicable. But it is said that by virtue of the interpretation clause in the principal Act —that of 1882—"endowment policies" are included in the protection contained in the Act which we have before us, that is the Act of 1887. Before passing on to the difficulties in the way of applying that interpretation clause I desire to observe—first, that there is no class of enactment which has been subjected to such severe animadversion as the interpretation clauses in various statutes, and there is no provision of statutory law which is more readily got rid of or more readily yields to the great rule of interpretation, viz. that the will of the Legislature must be ascertained by the last exposition of its intention, than do the interpretation clauses of any enactment. Says Mr. Wilberforce in his book on Statute Law, p. 296—"Among par-"ticular sections, the one which of all others has occupied the time "and attention of the Courts, is the interpretation clause. Severe "censures have been passed upon this section by some of the Judges. "It has been said that a very strict construction should be placed "upon a section which declares that one thing shall mean another, "that interpretation clauses embarrass rather than assist the Courts in "their decisions, and frequently do a great deal of harm by giving a "non-natural sense to words which are afterwards used in a natural "sense without the distinction being noticed." Mr. Justice Lush also says in *The Queen* v. *Pearce* (5 Q.B.D. at p. 389)—"But I think "an interpretation clause should be used for the purpose of inter-"preting words which are ambiguous or equivocal, and not so as to "disturb the meaning of such as are plain." Mr. Justice Grove, in *Budge* v. *Andrews* (3 C.P.D. p. 521), says—"I cannot call to mind "any case in which an interpretation clause in a previous Act has "been allowed to control or limit the effect of provisions in a subse-"quent Act." But it is really not necessary to cite authorities as to the difficulty of applying the language of an interpretation clause to

subsequent legislation, because in the intrepretation clause contained in the principal Act of 1882 the meaning given is not to be applied if "the context requires a different construction." As to the applicability of this definition, contained in the Act of 1882, to the Act of 1887, I have first to observe that it did not apply to the corresponding section in the principal Act—that is the protecting section 33—*ex vi termini*, for the reasons I have already stated. Secondly, in the second Act on the subject—the Act of 1885 (No. 350, sec. 2)—when the Legislature wanted to make use of the same interpretation clause contained in the principal Act, it re-enacted it in terms. If the Legislature intended the interpretation clause to apply to the third Act why was it not repeated as it was in the second Act? Thirdly, not only has the Legislature in the third Act not re-enacted the intrepretation clause as it did in the second, but it has inserted another interpretation clause—that which is contained in section 5, which is as follows:—"In the construction "of this Act the word 'policy' shall include all moneys howsoever "payable, assured thereby, or which may be paid or become payable "thereunder, and all the property and interest therein of the person "assured, and the word 'will' shall include codicil, and the word "'insolvency' shall include liquidation by arrangement and any "composition." Fourthly, the only word in the interpretation clause in the Act of 1885, containing six definitions, applicable to this third Act, is the word "policy," to which a new interpretation is given; and the words "moneys (howsoever) payable," to which a substituted and more concise definition is also given in clause 5 of the Act of 1887. Fifthly, in the interpretation clause of the Act of 1882 the word "policy" includes three kinds of contracts—Firstly, life insurance, which requires no interpretation at all; secondly, endowment; and, thirdly, annuity. Now annuities cannot possibly be included in the protective Acts because the measure of protection which is given in these cases is always a sum of money. In the first Act I think it was put at £500, in this Act it is £2,000, and that is of course not applicable to a sum of money payable yearly during the term of the life of the assured, because that is an uncertain period and cannot be measured by any pecuniary standard. So that all this elaborate machinery for applying the interpretation clause of the former Acts to the third Act is for the purpose of including the word "endowment" within the interpretation of the word "policy," whilst the Legislature have in that Act included an express interpretation of the word "policy." If

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it had been intended to include "endowment" it would have been the easiest thing in the world to have added "endowment" to the definition. Lastly, the terms of the protection are to my mind inconsistent with an endowment policy. What is protected is the policy on the assured's "own life," which, "subject to any disposition made during his life "on his death, is to be held by his legal personal representatives in "trust" either for his next of kin or for the persons appointed by his will—(Section 3). Now, under any endowment policy, if the assured lives to the date mentioned therein, the policy ceases to exist by payment of the money, and it is of course impossible that the policy, which has ceased to exist, or the moneys payable thereunder, which are not earmarked, should pass to the executor or administrator, which is the measure of protection given by this particular enactment.

On these grounds I have come to the conclusion that the interpretation clause of the Act of 1882 is not applicable to the Act of 1887. I have not overlooked the provisions of the Act of 1887 to which attention has been called, which make the policy "the absolute property" of the assured. My answer to that difficulty, however, is that it is not for us to extend the measure of the protection given by the statute. As I have already said, this difficulty has arisen in consequence of the attempt on the part of the framers of this enactment to make the protection self-acting instead of requiring the policy to be withdrawn from the estate by some settlement, as has been done in the English enactment on this subject contained in the Imperial Married Women's Property Act. Further, the protection contended for in this statute is opposed to the general provisions of legislation on the subject of insolvency. It is also inconsistent with what appears to me to be the scope of the legislation on the question; and, lastly, it seems to me to be opposed to the language of the protecting Act. For these reasons I have come to the conclusion that this particular policy is not protected from the insolvent's creditors by virtue of the Act of 1887.

My learned colleagues and myself have dealt with this subject on the material that was brought before us in the very able arguments addressed to the Court by the bar, but on considering the whole matter, and considering the general framework of the statutes, we find it impossible to resist the conclusion that this policy—if protected at all—is protected, not by the third Act, to the construction of which our observations

have been directed this morning, but by the intermediate and repealed Act of 1885. This policy of insurance was entered into several years ago, in 1872. According to the interpretation placed by the majority of the Court upon these Acts—an interpretation by which I am bound—the policy was protected by section 33 of the Act of 1882. The protection given by section 33 of the Act of 1882 was taken away by the repealing section 16 of the Act of 1885, which contained no saving of existing rights, but on that repeal coming into operation, so also, according to the judgments of my learned colleagues which have been delivered this morning, the protection given by the Act of 1885 came into play. In passing I desire to observe that if this policy be protected by the Act of 1887, *a fortiori* it is protected from the operation of the insolvency laws by the Act of 1885, because the definition clause upon which reliance has been placed by my learned colleagues is, with some slight modification, re-enacted in the Act of 1885. I think myself, for reasons which it is unnecessary for me to state at any length, that even with the interpretation clause re-enacted in the intermediate statute the protection was not large enough to prevent the policy from passing into the general estate, but, as I have already said, it must be admitted that under the Act of 1885 the case for the insolvent as against his assignees is very much stronger than under the Act of 1887. The Act of 1885 protected the policy not for the benefit of the insolvent himself but for the benefit of his family. The objects of the trust, that is the objects for which it is protected, are defined in schedule B. These are the wife, the husband, the children, the grandchildren, father, mother, brothers and sisters, and the grandparents of the assured. He, however, under the Act of 1885, had power given him by section 6 to direct that the benefits of the protected policy should pass to any persons of the classes I have mentioned, but he himself could obtain no benefit whatever. That being the state of the law under the Act of 1885, this policy being protected for the benefit of the family of the insolvent by that Act, the repealing clause of the Act of 1887—to which our attention was not directed during the argument, and which I am free to admit we did not notice until late in our deliberations on this case—whilst it sweeps away the Act of 1885, provides that it shall not "affect any policy on 'the life of any persons who shall have died before the passing of this "Act; nor shall the repeal affect any interest or right created or "existing under the Act hereby repealed or under any deed or "instrument already executed and taking effect thereunder." This

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particular policy was protected by the Act of 1885; the repeal of the Act has not affected that protection, and therefore the persons entitled to the benefit of the protection are not the insolvent himself, but some of the persons for whose benefit the protection was granted by the Act of 1885. I say that appears to me to be the effect of the repealing clause contained in the Act of 1887. That question, however, is not immediately before us. Before giving a final decision on that question we should have to hear what is to be said by the insolvent as to the effect of the Act of 1885, and the repealing clause of 1887, and it would be necessary also for us to have the parties who might be interested adversely to him before us. We have delivered our judgment on the basis of the Act of 1887, because we understand that several other cases will depend upon the opinion of the Court as to the operation of that Act. The judgment therefore in this case will be that the assignees are not entitled to the policy in question, and we must leave for further consideration of the parties who may have conflicting interests under it the question whether the destination of the policy is governed by the Act of 1885 or by the Act of 1887. So that a majority of the Court holds that the policy does not vest in the assignee or trustee, and that the policy is protected, but whether by the Act of 1887 or by the Act of 1885 we do not decide. The costs of both parties will come out of the estate.

Judgment that the policy is protected.

BOUCAUT, J.

1889
November 7.

In the Supreme Court.

IN THE MATTER OF THE NORTH AUSTRALIAN TERRITORY COMPANY LIMITED.

The Companies Act 1864—*Winding up of English company possessing property in South Australia and already in voluntary liquidation in England.*

The North Australian Territory Company, being a company possessing property in South Australia but registered in England, was in voluntary liquidation in England, notwithstanding which an order was granted for the winding up of the company by the Supreme Court of this province.

PETITION for order to wind up company.

J. H. Symon, Q.C., Gall and *Buchanan* for the petitioning creditors.

Sir John Downer, Q.C., and *Nesbit* for the respondent company.

J. H. Symon, Q.C.—I apply for an order, and I refer your Honor to the cases of *In re Commercial Bank of South Australia* (L.R. 33 Ch. D. 174), *Matheson Brothers* (L.R. 27 Ch. D. 225), *Commercial Bank of India* (L.R. 6 Eq. 517).

After hearing Sir John Downer, Q.C., and Mr. Nesbit,

BOUCAUT, J., made an order to wind up. Costs of all parties to come out of the assets of the company.

Order accordingly.

FULL COURT
BOUCAUT and BUNDEY, JJ.

In the Supreme Court.—In Banco.

1889
December 3.

REGINA (ON THE APPLICATION OF JOACHIM MATTHIAS WENDT) *v.* GEE.

The Gold Mining Act 1885, *sections 5 and 7—Mandamus to warden—Miner's right—Mining license—Power of warden.*

Her Majesty through Her wardens of goldfields has absolute discretion as to the issue of miners' rights or licenses under The Gold Mining Act 1885.

THIS was a motion to make absolute a rule *nisi* for mandamus granted by the Supreme Court on the application of Joachim Matthias Wendt and directed to Lionel Carley Egremont Gee, one of Her Majesty's wardens under The Gold Mining Act 1885, requiring him to show cause why he should not be commanded to register the occupation of the said Joachim Matthias Wendt of a certain reef claim, and to issue to him a certificate of such registration in the form provided by the regulations under the Act.

Nesbit (with him *Buchanan*) moved to make the rule absolute.

J. H. Symon, Q.C. (with him *Bleechmore*) showed cause—The relator is not entitled to this prerogative writ. It is applied for against the servant of the Crown, and this is not a case in which a mandamus will lie. *Tapping* (p. 112), *Regina* v. *Powell* (1 Q.B. old series 352).

Nesbit—Our client has taken up the reef claims and conformed to the rules, and we submit there is a statutory obligation on the warden to register him.

Symon, Q.C.—We submit there is not. The motion is not an honest or bona fide one. The warden supports another claimant, and he is rightly in possession. If the Crown chooses it need not register Mr. Wendt or those claiming under him. *Osborne* v. *Morgan* (L.R. 13 App. Cases 227).

Nesbit cited *Regina* v. *Commissioners for special purposes of the Income Tax* (L.R. 21 Q.B.D. 313) and *Regina* v. *The Registrar of Joint Stock Companies* (L.R. 21 Q.B.D. 131).

[BOUCAUT, J.—Do you say, Mr. Nesbit, that the Crown is bound to register?]

Nesbit—Yes, your Honor; by implication.

BOUCAUT, J.—This is an application for a mandamus on behalf of Mr. Wendt. It appears that Mr. Wendt sent out one Maynard to prospect in regard to a certain gold discovery, and through his agent, Mr. Bright, made an application to be registered according to the Act. It is very likely that Mr. Symon might have succeeded in resisting this application on the ground that there was a disputed title, and the Court would not interfere on that by mandamus. In view of the affidavits read to the Court we cannot shut our eyes to the fact that there are disputes as regarded the title between Mr. Nesbit's client and other persons, though from the point of view which I take of the case it is not necessary to investigate whether Wendt's title or the title of these other claimants is better. My judgment does not proceed on that. It is abundantly clear that before the Court takes upon itself to issue a prerogative writ of mandamus, which is exceedingly mandatory in its nature, the Court must be absolutely certain that it is doing right. There must be no doubt of the right of the party applying for the mandamus to get it. In cases where there is considerable doubt in regard to it the Court will not grant it, as laid down in *Tapping* (p. 11). Now the jurisdiction of the Court to issue this writ of mandamus depends upon the construction of the 5th and 7th sections of The Gold Mining Act 1885, but more particularly upon the framework of that Act generally. Now when Mr. Bright as agent for Mr. Wendt went to the warden of goldfields and asked him to register his application as agent for Mr. Wendt, the warden replied—"I won't register "this or any other application, as the Government have determined to do "nothing with reference to the registration of reef claims." It was not a refusal to Wendt or his friends alone, and it was not a refusal without some reason, for the warden added—"as the Government "have determined to do nothing with reference to the registration of "reef claims." That was a declaration by this Government officer that those he served—viz. for the purpose of this case Her Majesty—did not intend to allow reef claims to be brought under this particular Act. If there were anything in the Act which said that the Governor might proclaim these claims reef claims, even then I am not quite sure that Mr. Nesbit would be entitled to this mandamus. But the Act does not say so, and it does not say that this particular part of the country should be set apart for reef claims. It does not say that any particular part shall be included or excluded, but the Act as framed says that, as against all the world, a miner's right shall operate all over the colony. Therefore, the Act having taken such an exceedingly large grasp as

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that, it occurred to the framers of the Act that there must be something left to the officers of the Crown, and they have left it by saying that the Crown which gives the miner's right shall not be touched by it. That is the effect of section 7 and section 5. So a miner's right does not operate over the whole of the colony of South Australia, but only over such a part as the Government chooses. The *ipse dixit* of the Crown can be interposed at any moment and in any way it chooses, consequently these miners' rights do not confer a tittle of right as against the Crown itself, because the holders are only entitled "except "as against Her Majesty." I think we should be doing exceedingly wrong if, after the Crown officer administering these particular laws has informed the applicants that he is instructed by Her Majesty not to issue these licenses, we were to issue a mandamus ordering that officer to issue these licenses in defiance of that. For the reasons I have mentioned we are bound to take it that this officer has done his duty. It lies on those seeking a mandamus to show that the officer has exceeded his duty. That has not been done, and therefore the mandamus cannot go. I express no opinion on this, but the 24th section of the rules of the gold mining regulations is exceedingly carefully framed, so as to uphold the view I have taken of the matter. It seems to me that the Act was carefully framed so as to throw no duty on the warden, leaving him absolutely free to do as he chooses. It seems to me also that the framer of rule 24 might have drawn it so for the purpose of supporting the warden in any action he should take. That being the case, therefore it is impossible for the relator to maintain his right for a mandamus, and the rule must be discharged.

BUNDEY, J.

BUNDEY, J.—I agree with my learned colleague. At first it seemed to me that it was a singular thing if some provision were not contained in The Gold Mining Act 1885 by means of which difficulties of this description could be determined without coming to the superior Courts for that purpose. On hearing the case, however, I am inclined to think, but I express no final opinion on the matter, that Mr. Nesbit would have a right under certain circumstances to come to this Court and apply for a mandamus, but in this particular case he has failed to show his right to come to the superior Court and obtain a mandamus in this matter. Unquestionably the Act gives Her Majesty full control over these gold mining licenses, and were it otherwise the greatest injustice might ensue. I do not wish to repeat what I have said in regard to hard-working miners spending their lives in making gold discoveries, and then when the fact is made known to adventurers that

the latter should take advantage of their labors by reason of their want of knowledge of the technicalities connected with the mining laws. As far as the Act is concerned, if a provision does not exist to prevent such a thing the sooner an amendment to that effect is introduced the better. I think that in this case as the Government determined that these names should not be registered the warden was bound to act upon that, and that he has shown no neglect in his performance of duty.

Mandamus refused.

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December 5.
BOUCAUT and BUNDEY, JJ.

In the Supreme Court.—In Banco.

IN RE W. J. HINDE, AN INSOLVENT.

The Insolvent Act 1886—*Part XI—Deed of assignment—Order to set aside—Appeal against order — Requisite majority of creditors — Accidental omission.*

In arriving at a decision as to whether the requisite number of creditors have assented to a deed of assignment under Part xi. of The Insolvent Act 1886 the whole body of the creditors must be looked to, and not merely those mentioned in the schedule to the deed of assignment, even though the names of creditors not mentioned in the deed of assignment are accidentally omitted.

THIS was an appeal against an order of the Court of Insolvency, that the deed of assignment of W. J. Hinde be set aside on the ground that it had not been assented to by the requisite majority in number and value of the creditors, and also that there had been wilful and material omission of the names of creditors in one of the schedules to the deed.

Anderson for the insolvent.

Dashwood for creditors.

Anderson—I submit, first, that the application ought never to have been heard, being as it is a rehearing of a previous application; secondly, that there is no evidence that the omission of the names of the creditors was wilful and material, and that the deed is properly assented to. Furthermore, I contend that the certificate of the chairman of the meeting of creditors should have been impeached, for while that stands the deed must stand. He cited *In re William Towers Waterhouse* (17 S.A.L.R. 115).

Dashwood having replied,

Anderson—Under sec. 258 of The Insolvent Act 1886, if the omission is wilful it amounts to a misdemeanor. There is not such proof as would be necessary to prove a criminal offence.

BOUCAUT, J., said that by sec. 285 of The Insolvent Act 1886 a debtor had thrown on him the necessity of including in the schedule to the deed a list of his creditors, and there was a very proper provision that if he omitted to include his creditors in that schedule, then the Court had power if it thought fit to set aside that deed. But if the Court should be of opinion that the omission to include was not wilful or material, then sec. 288 provided that the deed ought not to be set

aside. He had considerable doubt as to whether he should disturb the judgment of the Commissioner in this case. He quite agreed with the law as laid down by the learned Commissioner, that if a man deliberately left out a name, though he had no intention of doing wrong, it was a wilful omission. He did not think that the omission in the present case was a wilful one, and on carefully perusing sec. 288 it appeared to him that the word "wilful" had a stronger meaning than he was at first disposed to attach to it, and was at least as strong as the word "fraudulent" in the case of *Waterhouse* cited by Mr. Anderson. As he did not think that Mr. Hinde had done anything that would make him liable for a misdemeanor—nothing fraudulent—it consequently followed that he was entitled to the benefit of his judgment. He therefore held that there was no wilful omission. The case, however, would stand over for rehearing before a fuller bench on the point as to whether the deed was void by reason of non-assent by the creditors, who Mr. Anderson said were innocently omitted from the deed.

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Anderson—I submit that to ascertain whether the deed was duly assented to the Court must simply look at the deed itself. The Court in ascertaining whether there is an assenting majority will not include the creditors who are not wilfully omitted; otherwise by a side wind the provisions of sec. 288 of The Insolvent Act 1886, which provides that the deed is not to be set aside unless the omission is "wilful and material," will be overridden. The intention of the Legislature, as expressed in sec. 288, was that deeds of assignment should not lightly be set aside, and here the grounds are not substantial.

Per Curiam—Sec. 288 cannot be read so as to protect the deed, as the requisite number of creditors have not assented to it. In arriving at a decision as to whether the requisite majority have assented, the whole body of creditors must be looked to, and not merely those mentioned in the deed of assignment, even though the creditors not mentioned in the deed are accidentally omitted.

Appeal dismissed with costs.

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BOUCAUT and BUNDEY, JJ.

In the Supreme Court.—In Banco.

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IN RE V. J. SOLOMON, AN INSOLVENT.

The Insolvent Act 1886: *section* 175, *sub-section* iii. *sub-section* viii. *and section* 4 *—Debt—Demand provable under insolvency—Imprisonment — Warrant and order of commitment—Appeal.*

S. persuaded Mrs. R. to execute a transfer in blank of certain shares in the Broken Hill Proprietary Mining Company Limited, and to hand the transfer to him. S. sold the shares and was subsequently adjudicated insolvent.

It was alleged that S. had fraudulently represented to Mrs. R. that the transfer was a transfer of certain other shares, and that S. had fraudulently used the shares transferred.

The Court of Insolvency ordered S. to be imprisoned for six months on the ground that he had contracted a debt with Mrs. R. by means of fraud or false pretences.

Held, that the claim of Mrs. R. was not such a debt as was contemplated by sub-section iii. of section 175 of The Insolvent Act 1886, and that the warrant and order for commitment were improperly framed and did not set forth sufficient causes for the imprisonment, and that the appeal must be upheld.

THIS was an appeal against an order for imprisonment made by the Court of Insolvency.

Nesbit for the trustee.

Sir J. W. Downer, Q.C., for the insolvent.

The facts are sufficiently referred to in the head-note, and the argument will sufficiently appear from the judgment.

BOUCAUT, J. BOUCAUT, J.—I have had very great doubts two or three times in the course of the argument, and some of them still remain, but I deal with the charge exactly as it appears. The order for imprisonment is on the ground that the insolvent contracted a debt by fraudulently stating that a certain transfer of Broken Hill shares was a transfer of Block 10 shares. It is manifest to demonstration that no debt of any sort could be contracted in the way stated. The signing of the transfer gave Mrs. Rankine no right to sue Solomon for any particular sum of money. There was no contract for him to keep the shares. If Solomon had given them back next day with the transfer erased Mrs. Rankine would have had to take them. No debt at law and no debt in equity was contracted, and I think no debt provable in insolvency. For these reasons the order of the Commissioner is bad on the face of it. Undoubtedly this is technical, and I would be sorry to rest my judgment

on this ground and to allow any man whom I saw was a fraudulent person to escape without referring the order back for amendment. However, I have to deal with the meaning of the word "debt" in subdivision iii. of section 175 of The Insolvent Act 1886. Mr. Nesbit has asked this Court to read that section as if the words "or obtained "any security" were put in it. But the subdivision merely refers to the contracting of a debt. The criminal law with regard to obtaining money by false pretences has been altered so as to include "securities." Therefore we cannot interpolate the words "or obtained any security" in this subdivision. Mr. Nesbit says the interpretation clause helps him by the meaning it gives to the word "liability," which he says extends to the obtaining money through the signature of the transfer. The enlarged meaning of the word "liability" in the interpretation clause is in my judgment applicable only to "provable debts." The Court is not justified in construing the word "debt" in section 175 as if it were "provable debt." Mr. Nesbit referred us to subdivision viii. of section 175. This only strengthens my opinion that the statute does not give the word "debt" the same enlarged meaning as it gives the words "provable debt," because the subdivision makes a distinction by having the words "any debt or demand provable under his insol-"vency." Therefore, as the Legislature has used the words "debt" and "provable debt," I hold that "debt" in section 175 subdivision iii. does not mean a debt which arises under the word "liability" in section 4. I will not attempt to define what "debt" means. It is sufficient to say that in section 175 it does not necessarily mean everything which is provable. This being the case the order on the face of it is bad, for by no possible means could a debt have arisen exactly in the way that was stated in the Court below. But after hearing Mr. Nesbit in regard to the very peculiar circumstances which the learned counsel says exist in this case, I will not go so far as to say that a debt does not exist here, and I am not quite clear that if the whole thing had been thoroughly set out in the order of committal that there was a gross fraud, that the transfer was falsely obtained, that there was a sale of the shares, and that the money had then been put into the insolvent's pocket; if, I repeat, the whole thing had been properly dovetailed together, I do not say that under such circumstances Mr. Nesbit might not have succeeded. And if I were satisfied that the fraud was as gross as Mr. Nesbit has argued it to be, I think it would probably be the duty of the Court to send the matter back to the Insolvency Court inasmuch as we possess that power. But every case

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must be considered on its merits, and inasmuch as the warrant and the order of committal are improperly framed and did not set forth sufficient causes for the imprisonment, I am induced to think that the particular point which Mr. Nesbit has pressed upon me was not sufficiently investigated. I do not think I am justified in sending back the case where the order is clearly bad, and unless I am thoroughly satisfied that the accused had committed the gross fraud which was charged against him. Undoubtedly the present case is a suspicious one, but then we have to look at every circumstance connected with it. Here was a man of business, as the insolvent undoubtedly was, representing day by day that he was dealing with these shares, and it is exceedingly difficult to say that Mrs. Rankine did not know that he was doing so. It might be that she did not know, but I think that before I sent the case back I should be abundantly satisfied that she was such an extraordinary simpleton that she imagined that the insolvent could earn money simply by showing a piece of blank paper, as this untransferred scrip practically was to others. It is almost inconceivable that any human being could consider such a thing, and I therefore do not think I ought to strain a point against the insolvent on this branch of the case. If the facts are as Mr. Nesbit put them it will be difficult for the insolvent to resist a prosecution for false pretences ; and as it is open to Mrs. Rankine to bring such a charge if she thinks fit, I come to the conclusion that I will not express an opinion one way or another upon it. The appeal will therefore be upheld and the order quashed.

BUNDEY, J., concurred.

Appeal upheld, order quashed.

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